United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

76-7259

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United States Court of Appeals

FOR THE SECOND CIRCUIT

THOMAS J. BYRNES and FRANCIS R. SANTANGELO,
Plaintiffs-Appellants,

—against—

FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC.,
Defendants-Appellees.

FAULKNER, DAWKINS & SULLIVAN,
Counterclaim-Plaintiff, Appellee, Appellant,

—against—

THOMAS J. BYRNES and FRANCIS R. SANTANGELO,
Counterclaim-Defendants, Appellants, Appellees,

and

TOBEY & KIRK,
Counterclaim-Defendant-Appellee.

APPENDIX

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UNITED STATES COURT OF APPEALS
FILED
AUG 18 1976
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

Index to Appendix

Docket Sheets	A-F
Plaintiffs' Notice of Appeal	1
Faulkner, Dawkins & Sullivan's Notice of Appeal	2
Order and Judgment Appealed From	4
Opinion # 43960, Werker, J., Granting and Denying Cross-Motions for Summary Judgment	5
Amendment to Opinion # 43960, Werker, J., Dismissing all Claims and Counterclaims	23
Opinion # 39582, Gurfein, J., Dismissing Complaint with leave to Replead	25
Opinion # 39631, Gurfein, J., Amending Opinion # 39582	31
Opinion # 39696, Gurfein, J., Denying Reargument or Certification under 28 U.S.C. § 1292(b)	32
Complaint	33
Answer and Counterclaims of Faulkner, Dawkins & Sullivan	48
Answer and Counterclaims of Singer & Mackie, Inc.	58
Plaintiffs' Reply to First Counterclaim of Faulkner, Dawkins & Sullivan	64
Tobey & Kirk's "Answer to Third Party Complaint"	68
Plaintiffs' Notice of Motion for Partial Summary Judgment Dismissing Faulkner, Dawkins & Sullivan's Second and Third Counterclaims	71
Exhibit to Omitted Affidavit Submitted in Support of Plaintiffs' Motion: "Pink Sheet" for White Shield, June 15, 1971	73
Faulkner, Dawkins & Sullivan's Affidavits in Opposition to Plaintiffs' Motion for Partial Summary Judgment: Affidavit of James Mullen	74
Plaintiffs' Notice of Motion for Reargument or for Certification under 28 U.S.C. § 1292(b)	76

Plaintiffs' Reply and Counterclaim 78

Faulkner, Dawkins & Sullivan's Reply to Plaintiffs' Counterclaim 90

Plaintiffs' Interrogatories to Singer & Mackie, Inc., Interrogatory # 1(g); and Singer & Mackie Answer 91

Faulkner, Dawkins & Sullivan's Interrogatories to Plaintiffs ## 16, 28 and 29; and Plaintiffs' Answers 93

Faulkner, Dawkins & Sullivans Interrogatories to Tobey & Kirk, ## 4 and 5; and Tobey & Kirk's Answer and Additional Answer 96

Stipulation of Facts 99

Plaintiffs' Notice of Motion for Summary Judgment 112

Solomon Affidavit Submitted in Support 119

Exhibit "1"---Base Prospectus 125

Exhibit "2"---"Leason Prospectus" 130

Exhibit "3"---Prospectus in Suit 138

Exhibit "4"---Prospectus of June 14, 1971 143

Exhibit "5"---Sample Stockholders Agreement 153

Exhibit "6"---Counsel's Letter to Stockholders 161

Exhibit "7"---Plaintiffs' Letter to Issuer's Counsel 162

Byrnes Affidavit Submitted in Support 163

Exhibit "8"---White Shield Press Releases and Sticker Supplement 171

Exhibit "9"---Omitted

Santangelo Affidavit Submitted in Support 174

Exhibit "10"---Santangelo Deposition in

Landau Affidavit Submitted in Support 194

Plaintiffs' Rule 9(g) Statement 198

Tobey & Kirk's Notice of Motion for Summary Judgment 206

Faulkner, Dawkins & Sullivan's Notice of Motion for Summary Judgment 209

Green Affidavit Submitted in Support of Faulkner, Dawkins & Sullivan's Motion, and in Opposition to Plaintiffs' Motion 211

Deposition of Tobey & Kirk by Vincent C. Ross, Jr. 214

Deposition of James MacMillen as a Witness 266

Deposition of Faulkner, Dawkins & Sullivan by Ronald Lattuga 351

Deposition of Faulkner, Dawkins & Sullivan by Marc R. Green 398

Exhibits to Depositions of Faulkner, Dawkins & Sullivan

Exhibit "2"---Affidavit of James MacMillen, 5/3/73 442

Exhibit "3"---Affidavit of Ronald Lattuga, 5/7/73 and Exhibits 444

Exhibit "4"---Memorandum of Lattuga and MacMillen Prepared June or July 1971 450

Exhibit "5"---Affidavit of Marc R. Green, 5/7/73 452

Plaintiffs' Notice of Motion for Reargument or for Certification under 28 U.S.C. § 1292(b) or FRCP 54(b) 456

Faulkner, Dawkins & Sullivan's Notice of Motion for Reargument 458

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE WERKER

Jury demand date:

F/S 11 8/20

Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
THOMAS J. BYRNES & FRANCIS R. SANTANGELO -VS- FAULKNER DAWKINS & SULLIVAN & SINGER & MACKIE INC.	For plaintiff: Carro Spanbock & Londin 10 East 40th Street NYC 10016 MU 5 2700 BEST COPY AVAILABLE For defendant: Jacobs Persinger & Parker (Dft. Faulkner, Dawkins & Sullivan) 70 Pine Street, NYC 10005 344 1566 Borden & Ball (Singer & Mackie, Inc.) 345 Park Avenue, NYC 10022 980 3350 Borden & Ball, Esq. 345 Park Ave. NYC, NY 10022 (212)980-3350) Lawler, Sterling & Kent (for Tobey & Kirk) 500 Fifth Ave. NY 10036 736-7050

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.		DISB.	
J.S. 5 mailed x	Clerk			2/13/73	Canna. S.	15			
				2/14/73	US			15	
J.S. 6 mailed	Marshal								
Basis of Action: E.E.C. Act of 1933 & 1934.	Docket fee								
	Witness fees								
Action arose at:	Depositions								

Thomas J. Byrnes, et ano. ... vs. ...

JUDGE WERKER 73 CIV 1520

DATE	PROCEEDINGS	Date Order or Judgment Noted
Feb 13.73	Filed Complaint for declaratory judgment. issued summons.	
Feb 27.73	Filed Pltff's Interrogs. to Dft. Faulkner Dawkins & Sullivan. First Set.	
Feb 27.73	Filed Pltff's Interrogs. ot Dft. Singer & Mackie Inc. First Set.	
Feb 27.73	Filed Summons and marshals ret. Served: Faulkner Dawkins & Sullivan on 2/15/73 Singer & Mackie, Inc. on 2/23/73	
Mar 2.73	Filed ANSWER & COUNTERCLAIMS by Dft. Faulkner Dawkins & Sullivan.	JP&P
Mar 7.73	Filed Affidavit of Service Summons, Answer & Counterclaims of dft. by Carlos Edwards.	
Mar 15.73	Filed Additional Summons and marshals ret. Served: Chauncey B. O'keefe, Basil Skalos, Edward Eschelbert, Thomas C. O'keefe, Herbert Buschman, Antonio S. Cueva, Vincent Ross, Jr., by Diamond Poppudgall on 3/9/73. UNABLE TO SERVE: JOHN E. SCOTT, & RUNDLET BLAKEMORE.	B&B
Mar 15.73	Filed ANSWER & Counterclaim by Dft. Singer & Mackie, Inc.	
Mar.23,73	Filed Addl.Summons, with Marshal's Returns.	
Mar.?,73	Filed Objections to Pltffs'Interrogs to Deft.Faulkner,Dawkins&Sullivan-First Set.	
Mar.?,73	Filed Answers to Pltffs'Interrogs to Deft.Faulkner,Dawkins&Sullivan,First Set.	
Mar.11,73	Filed Deft Faulkner,Dawkins&Sullivan's Notice to take deposition upon oral examinatio n.	
Mar.23,73	Filed Stip & Order extending for 3rd pty deft to answer 3rd pty complaint is 5/10/73. Gurfein,J.	
Mar.27,73	Filed Pltff's Reply to Faulkner's First Counterclaim.	
Mar.27,73	Filed Pltff's Notice of Motion for Partial Summary Judgment & Other relief,before Judge Gurfein,Room 7/5/22,	
Mar.27,73	Filed Pltffs'Memorandum in support of motions to dismiss for failure to state a claim for relief or for summary judgment with respect to 2nd&3rd counterclaims asserted by Deft Faulkner; to strike or dismiss Faulkner's claims for punitive damages;and to dismiss or sever counterclaims against additional counterclaim deft.	B&B
May 3,73	Filed Deft.Singer&Mackie,Inc. AMENDED ANSWER to Complaint.	
May 17,73	Filed Interrogs of Deft Faulkner,Dawkins&Sullivan to Pltff Thomas J.Byrnes,(First Set)	
May 17,73	Filed Interrogs.of Deft Faulkner,Dawkins&Sullivan to Pltff Francis H.Santangelo(First Set	
May 17,73	Filed Pltffs' Notice to take deposition of Deft. Faulkner,Dawkins&Sullivan, 6/5/73,10:00 A.M.	
May 17,73	Filed Pltff's Notice of Deposition upon oral examination of witness,James MacMillan on 6/4/73,10:00 A.M.	
May 18,73	Filed Deft.Faulkner,Dawkins&Sullivan Affdvts in opposition to Pltffs Motion for partial summary judgment and other relief.	
May 18,73	Filed Memorandum of Law of Deft Faulkner,Dawkins&Sullivan in opposition to Pltffs' motion for partial summary judgmont and other relief.	
May 21,73	Filed Deft.Singer&Mackie's Objections to Pltffs'Interrogs.(First Set)	
May 21,73	Filed Deft.Singer & Mackie's Answers to Pltffs'Interrogs(First Set)	
May 22,73	Filed Pltff's Stip & Order extending time from 5/21/73 to 5/30/73 re: motion to dismiss 2nd and 3rd counterclaims,etc.Gurfein,J.	
May 24-73	Filed Affidavit in opposition to motionof Tobey & Kirk to dismiss counterclaims.	LS&K
May 24-73	Filed ANSWER of Tobey & Kirk to third party complaint.	
May 29-73	Filed Notice of Motion in ROOM 7 Ret. 5/30/73. re: dismiss 2nd and 3rd counterclaims, etc.	
May 31-73	Filed Rebuttal Affidavit.	
Jun 1-73	Filed Statement pur. to Rule 9(g). of General Rules.	
Jun 19,73	Filed OPINION#39582. Complaint is dismissed with leave to follow the pleading route suggested in this opinion.So Ordered.Gurfein,J.	
Jun 19,73	Filed OPINION#39582.Complaint is dismissed with leave to follow pleading route suggested in this opinion.Gurfein,J.	mn

Cont'd Next Page

BYRNES, ETANO VS FAULKNER & SULLIVAN, ETANO 73 CIV 670

CIVIL DOCKET D.C. 3 JUDGE WE[illegible]

DATE	PROCEEDINGS	JUDGMENT ENTERED IN ENCUMBRANCE RETURNS
Jul.2-73	Filed pltffs' notice of motion for reargument or certification.Ret.7-17-73	
Jul.2-73	Filed pltffs' Memorandum in support of motion for reargument, etc.	
7-13-73	Filed defts. Faulkner,Dawkins and Sullivan memorandum of law in opposition to pltffs. motion for reargument or for certification pur. to 28 USC 1292b.	
6-27-73	Filed opinion #39631.Opinion dated June 19,1973 is amended as follows,etc.So ordered,Gurfein,J. 7/7/	
7-2-73	Filed notice of motion by pltff. for reargument or certification - ret. 7-17-73	
7-23-73	Filed pltffs memorandum of law in support of motion for re-argument.	
7-23-73	Filed pltffs memorandum of law in reply and in support of motion for re-argument or certificateion.	
7-23-73	Filed OPINION #39696 ..the Court finds that the delay in making the motion was excusable. The motion for re-argument is denied. The motion for certification is denied. It is so ordered -- Gurfein, J.(m/n)	
7-26-73	Filed pltff Santangelo answers to interrogs. propounded by deft. Faulkner Dawkins & Sullivan.	
7-20-73	Filed pltff Byrnes' answers to interrogs by deft. Faulkner, Dawkins & Sullivan	
Sep.14,73	Filed Reply and Counterclaim of Thomas J. Byrnes and Francis R. Santangelo.	
Oct.4-73	Filed counter-claim pltf's. reply tothe purported counterclaim of Thomas J. Byrnes and Francis R. Santangelo set forth in paragraphs 35 through 37 of their reply and counterclaim and affdt.	
Nov.5-73	Filed for Defts. Tobey & Kirk Affidavit of Vincent C. Ross, in connection w/shares of White Shield Corp. etc.	
Nov.7-73	Filed Interrogatories of Counterclaim Pltff. Faulkner,Dawkins & Sullivan	
Jan-4-74	Filed defendant Togey & Kirk's answers to interrogs. of Faulkner, Dawkins & Sullivan.	
Dec-28-73	Filed by Faulkner, Dawkins & Sullivan, affdvt. and notice of motion for an order compelling discovery and awarding costs.	
Jan-10-74	Filed memo endorsed on above motion: Discovery hearing having been had in a substantial way, the motion is in that respect moot. With respect to the imposition of costs, I will deny the motion without prejudice to its renewal at the determination of the action. - Gurfein, J. m/n	
Jan-10-74	Filed reply affdvt. of Michael Bayda	
Jan-10-74	Filed affdvt. of S. Pitkin Marshal in response to motion of counterclaim-plaintiff.	
10-31-73	PRE-TRIAL CONFERENCE HELD BY Gurfein).	

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DATE	FILINGS—PROCEEDINGS	AMOUNT RECEIVED IN SATISFACTION OF JUDGMENT
Mar 13 74	PRE-TRIAL CONFERENCE HELD BY Curfein, J.	
Nov- 8-74	Filed deft. Faulkner's notice to take depositions of Lawler, Sterling & Kent as a witness on 11-15-74 - subp. issued.	
02-04-75	Filed depositions of Tobey & Kirk by Vincent C. Ross, Jr. dated 4-10-73 m/n	
02-18-75	Filed plaintiff's affdvt. and notice of motion for summary judgment - ret. 4-17-75	
02-18-75	Filed plaintiffs memorandum in support of motion for summary judgment.	
02-18-75	Filed plaintiffs affdvt. under Rule 9(g)	
02-18-75	Filed affdvt. of service by plaintiff of motion papers filed today (for summary jdgmt.	
02-18-75	Filed depositions of James McMillen on June 4, 1973 m.n	
02-18-75	Filed depositions of Faulkner Dawkins and Sullivan on 2-6-75 m.n.	
02-18-75	Filed depositions of Faulkner Dawkins and Sullivan on 6-21-73 m.n.	
02-18-75	Filed depositions of Faulkner Dawkins and Sullivan on 6-3-73 m.n.	
02-25-75	Filed stip. and order in re stock facts bearing upon the resale by deft. Faulkner Werker, J.	
03-11-75	Filed by deft. Tobey & Kirk/ ~~statement under~~ Rule 9 and notice of motion for summary judgment - ret. 4-17-75	
03-11-75	Filed deft. Tobey & Kirk's memorandum of law in support of above motion	
04-02-75	Filed stip. and order that the motions for summary judgment are adj. to 5-30-74: Faulkner to serve papers in support and opposition by 4-15-75; pltfs and ~~counterclaim defendants will serve papers in re motions by 5-6-75~~ Werker, J.	
04-09-75	Filed motion of the SEC for leave to file Memorandum as AMICUS CURIAE	
04-15-75	Filed on behalf Faulkner, Dawkins & Sullivan memorandum of law in support of motion for summary judgment by Faulkner and in opposition to motions of pltfs' ~~and counterclaim defendants for summary judgment.~~	
04-15-75	Filed deft. Faulkner, Dawkins & Sullivan's affdvt., Rule 9(g) statement and notice of motion for summary judgment. - ret. 5-30-75	
04-15-75	Filed order (attached to motion by SEC for leave to file Memorandum as AMICUS CURIAE) that the motion of the SEC to file on or before May 12, 1975, a memorandum of law, as amicus curiae, on certain issues raised in the cross-motions for summary judgment is hereby granted. -- Werker, J. m/n	
05-09-75	Filed stip. and order that pending motions for summary judgment are adj. to 6-19-75 and directing time to file answering papers. -- Werker, J.	
05-27-75	Filed memorandum of the S.E.C., Amicus Curiae , in support of motion of deft. Faulkner, Dawkins & Sullivan for summary judgment.	
05-28-75	Filed pltfs' reply memorandum in support of their motion for summary judgment, and their answering memorandum in opposition to Faulkner's motion for summary judgment.	
06-17-75	Filed deft. and counterclaim defts pltf. Faulkner, Dawkin. and Sullivan reply memorandum	
03-08-76	Filed plaintiffs notice of motion for reargument or certification under 28:1292(b) or Rule 54(b) - ret. 3-22-76	

See page 5

Docket Continuation

DATE	PROCEEDINGS	Date Order or Judgment Note
2-27-76	Filed OPINION #43960...The parties have made cross-motions. Plaintiffs' motion for summary judgment on Faulkner's first affirmative defense and 3rd counterclaim is denied. Defendant being entitled to judgment as a matter of law, etc., summary judgment is granted on the 2nd affirmative defense and on the 1st counterclaim to the extent it relates to this defense. The court denied both motions for summary judgment on deft's 3rd affirmative defense. Defendants motion for summary judgment on its 4th affirmative defense and its 2nd counterclaim is denied. Plaintiffs' motion for summary judgment on defendant's 4th affirmative defense and 2nd counterclaim is hereby granted. Defendant's motion for summary judgment on its 5th affirmative defense is hereby denied and the plaintiffs' motion with respect to this defense is granted. Plaintiffs motion for summary judgment, dismissing Faulkner's 6th affirmative defense is granted. Re 7th affirmative defense, this court finds that the reasonableness of the pltfs' conduct is a question of fact which cannot be determined in a motion for summary judgment. Re 8th affirmative defense, the court finds no violation of Regulation T. The defendants motion for summary judgment on its ninth affirmative defense is denied; plaintiff's motion to dismiss that defense is granted. Except with respect to defendant's 2nd affirmative defense, Faulkner's motion for summary judgment on its first counterclaim is in all other respects denied. Plaintiffs' motion for summary on their claim for declaratory relief and to dismiss defendants first affirmative defense is denied. So ordered. -- Werker, J. m/n	
3-08-76	Filed plaintiffs notice of motion for reargument or certification under 28:1292(b) or Rule 54(b) - ret. 3-22-76	
3-08-76	Filed plaintiffs memorandum of law in support of above motion for reargument.	
3-08-76	Filed defendants notice of motion for reargument of motions for summary judgment - ret. 3-19-76	
3-03-76	Filed defendants memorandum in support of above motion for reargument of summary judgment motions	
3-11-76	Filed affdvt. of service by Faulkner Dawkins & Sullivan of memorandum in support of motion for reargument upon Mr. Kent of Hall, Dickler, Lawler, Kent & Howley, Esqs.	
3-16-76	Filed memorandum of deft and counterclaim-pltf. in opposition to pltfs motion for reargument and for other relief.	
3-16-76	Filed pltfs. memorandum of law in opposition to deft. and counterclaim def Faulkner's motion forreargument.	
3-13-76	Filed AMENDMENT TO OPINION #43960 filed on 2-27-76..... Except as indicated herein, the Court was not persuaded that the opinion dtd. 2-26-76 (filed on 2-27-76) should be changed in any fashion. Submit order on notice. -- Werker, J. m/n -----attached to original opinion-----	
3-28-76	Mailed notice of reassignment of this action to Haight,J.	
05-07-76	Filed Order and Judgment - That the Counterclaim of Pltff's. & Counterclaim-Defts. Thomas J. Byrnes & Francis R. Santangelo be dismissed with prejudice and that the First, Second & Third Counterclaims of Deft. & Counterclaim-Pltff. Faulkner, Dawkins & Sullivan be dismissed with prejudice.....Werker,J. Judgment Entered 5-10-76.....Clerk. Entered 5-12-76. (mailed notice)	
6-25-76	Filed notice of appeal by Thomas J. Byrnes and Francis R. Santangelo to the USCA for the 2nd Circuit from part of order that dismissed pltfs. complaint against defts' Faulkner, Dawkins & Sullivan and Singer & Hickey for lack of jurisdiction and part of order of 5-7-76 that dismissed counterclaims by T. J. Byrnes and F. R. Santangelo against Faulkner Dawkins & Sullivan and granting summary judgment to said defendants, etc. Mailed copies.	

PROCEEDINGS	Date Order or Judgment Note
6- Filed by plaintiffs and counterclaim defendants Thomas J. Byrnes and Francis R. Santangelo -- notice of appeal to the USCA for the 2nd Circuit from part of final order of 5-7-76 as dismissed with prejudice and without costs all claims or counterclaims asserted by pltfs.; and so much of an order by Judge Gurfein filed 6-19-73, as amended by order dated 6-19-73 and filed on 6-27-73, as dismissed pltfs complaint against defendants Faulkner, Dawkins and Sullivan and Singer & Mackie, Inc. for lack of subject matter jurisdiction and from part of order dated 2-26-76, as amended 4-8-76 as indicated herein, copies mailed to Jacobs, Persinger & Parker, Esqs. and Borden & Ball, Esqs.	
Filed Dft. & counterclaim pltff. Faulkner Dawkins & Sullivan Notice of Cross Appeal of the Judgment of 6/10/76. (mailed notice)	
6 Filed stipulation that the exhibits to the several depositions filed in connection with certain motions be made part of the record on appeal to U.S.C.A.	
Filed notice of certification & transmittal of the record on appeal to the U.S.C.A.	

Plaintiffs' Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS J. BYRNES and FRANCIS R. SANTANGELO,

Plaintiffs,

-against-

Index No. 73 Civ. 670 HFW

FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC.,

Defendants.

FAULKNER, DAWKINS & SULLIVAN,

Counterclaim-Plaintiff,

-against-

AMENDED NOTICE OF APPEAL

THOMAS J. BYRNES, FRANCIS R. SANTANGELO AND TOBEY & KIRK,

Counterclaim-Defendants.

S I R S :

PLEASE TAKE NOTICE, that the plaintiffs and counterclaim-defendants THOMAS J. BYRNES and FRANCIS R. SANTANGELO ("plaintiffs"), hereby appeal to the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. § 1291, from:

(a) So much of the final judgment entered on or about May 7, 1976 as dismissed with prejudice and without costs all claims or counterclaims asserted by plaintiffs; and

(b) So much of an Order of the United States District Court for the Southern District of New York, Hon. MURRAY I. GURFEIN, U.S.D.J., filed on or about June 19, 1973, as amended by Order dated June 19, 1973 and filed on or about June 27, 1973, as dismissed plaintiffs' complaint against defendants FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC., for lack of subject matter jurisdiction; and

Plaintiffs' Notice of Appeal

(c) So much of an Order of the United States District Court for the Southern District of New York, Hon. HENRY F. WERKER, U.S.D.J., dated February 26, 1976, as amended April 8, 1976, as granted summary judgment dismissing the counterclaims asserted by plaintiffs THOMAS J. BYRNES and FRANCIS R. SANTANGELO against defendant and counterclaim-plaintiff FAULKNER, DAWKINS & SULLIVAN, and granted summary judgment to said defendant and counterclaim-plaintiff on its Second Affirmative Defense; and from so much of said Order as denied plaintiff's motion for summary judgment dismissing as insufficient in law the First, Second, Third and Seventh Affirmative Defenses asserted by defendant and counterclaim-plaintiff FAULKNER, DAWKINS & SULLIVAN.

Dated: New York, New York
May 28, 1976

Yours, etc.,

CARRO, SPANBOCK, LONDIN, RODMAN & FASS
Attorneys for plaintiffs and counter-claim defendants THOMAS J. BYRNES and FRANCIS R. SANTANGELO

By _____
A Member of the Firm

10 East 40th Street
New York, New York 10016
Tel. (212) 889-3600

Notice of Appeal of Faulkner, Dawkins & Sullivan

CAPTION OMITTED *NOTICE OF CROSS-APPEAL*

S I R S :

PLEASE TAKE NOTICE that defendant and counterclaim-plaintiff Faulkner, Dawkins & Sullivan ("Faulkner") hereby appeals to the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. § 1291, from:

(a) So much of the ORDER AND JUDGMENT entered on May 10, 1976 as dismissed with prejudice and without costs the second and third counterclaims

of Faulkner against plaintiffs and counterclaim-defendants Thomas J. Byrnes ("Byrnes") and Francis R. Santangelo ("Santangelo") and counter-claim-defendant Tobey & Kirk.

(b) So much of the ORDER AND JUDGMENT entered May 10, 1976, upon a decision of the United States District Court for the Southern District of New York, Hon. Henry F. Werker, U.S.D.J., dated February 26, 1976, as amended April 8, 1976, to the extent that said decision:

(i) denied Faulkner's motion for summary judgment on its third affirmative defense to Byrnes' and Santangelo's breach of contract claim against Faulkner (the "Contract Claim");

(ii) denied Faulkner's motion for summary judgment on its fourth affirmative defense to the Contract Claim and granted Byrnes' and Santangelo's motion for summary judgment dismissing said defense;

(iii) denied Faulkner's motion for summary judgment on its fifth affirmative defense to the Contract Claim and granted Byrnes' and Santangelo's motion for summary judgment dismissing said defense;

(iv) denied Faulkner's motion for summary judgment on its seventh affirmative defense to the Contract Claim;

(v) denied Faulkner's motion for summary judgment on its ninth affirmative defense to the Contract Claim and granted Byrnes' and Santangelo's motion for summary judgment on said defense.

Dated: New York, New York
June 7, 1976

Yours, etc.

JACOBS PERSINGER & PARKER

By _____
A Member of the Firm
Attorneys for defendant and
counterclaim-plaintiff
Faulkner, Dawkins & Sullivan
70 Pine Street
New York, New York 10005
Tel. (212) 344-1866

Judgment and Order Appealed From

CAPTION OMITTED

ORDER AND JUDGMENT

This cause having come on to be heard upon the motions of Plaintiffs and Counterclaim-Defendants Thomas J. Byrnes and Francis R. Santangelo and Counterclaim-Defendant Tobey & Kirk for summary judgment and upon the cross-motion of Defendant and Counterclaim-Plaintiff Faulkner, Dawkins & Sullivan for summary judgment, and the court having granted said motions in part and denied them in part by its decision dated February 26, 1976, as

amended by its decision dated April 8, 1976, it is hereby

ORDERED, ADJUDGED AND DECREED that the Counterclaim of Plaintiffs and Counterclaim-Defendants Thomas J. Byrnes and Francis R. Santangelo be dismissed with prejudice and without costs to any party; and it is further

ORDERED, ADJUDGED AND DECREED that the First, Second and Third Counterclaims of Defendant and Counterclaim-Plaintiff Faulkner, Dawkins & Sullivan be dismissed with prejudice and without costs to any party.

Dated: New York, New York
May 6, 1976

Henry F. Werker
U.S.D.J.

JUDGMENT ENTERED - 5/10/76
s/ Raymond F. Burghardt, Clerk

Opinion #43960, Granting and Denying Summary Judgment

[¶ 95,463] Byrnes, et al. v. Faulkner, Dawkins & Sullivan, et al.

United States District Court, Southern District of New York. 73 Civ. 670. February 26, 1976. Opinion in full text.

Sale of Securities—Misrepresentations—Registered Distribution—Purchase of Registered Securities.—Whether or not securities offered for sale are part of a registered distribution and whether or not the status of the securities has been concealed are issues of fact material to a determination of a violation of Section 17 of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934. A broker-dealer repudiated a contract for the purchase of securities and raised as a defense to the breach of contract action the allegation that the sale was made in reliance on a false and fraudulent representation about the status of the securities. The omission of material facts about the status of the securities was an issue which was unresolved and therefore inappropriate for a summary judgment.

See ¶ 4815, "Securities Acts—Liabilities" division, Volume 1; ¶ 22,721 and 22,725, "Exchange Act—Manipulations" division, Volume 2.

Securities Act—Sale of Securities—Prospectus—Written Comparison Between Broker-Dealers as a Prospectus.—A written comparison transmitted between broker-dealers is a prospectus which must conform to Section 10 of the Securities Act of 1933 if the comparison confirms the sale of a security. A prospective purchaser of securities sought to cancel the contract of sale. In an action for breach of contract, the purchaser raised

[*] Complaint ¶ 22 (emphasis added).

[**] 18 N. Y. 2d 573, 277 N. Y. S. 2d 411 (1966).

[***] Plaintiffs' objection that this motion is "unreasonable" because it could and should have been brought with respect to the original complaint, which was identical to the amended complaint so far as is relevant to this branch of the motion, is without merit. Apart from the fact that the filing of the amended complaint subjects it to all Rules of the Federal Rules of Civil Procedure, defendant could have raised plaintiffs' failure to state a claim at trial even had the original complaint not been superseded. *See* Fed. R. Civ. P. 12(g), 12(h)(2).

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Opinion # 43960, Granting and Denying Summary Judgment

as an affirmative defense the issue of the illegality of the sale for not conforming with Section 5 of the Securities Act. The purchaser alleged that a comparison accompanying the delivery of the shares was a prospectus that did not fulfill the requirements of Section 10 of the Securities Act. Given the broad definition of "prospectus" found in Section 2(10), the court found that "any . . . communication, written . . . which . . . confirms the sale of a security," such as the comparison in this action, is a prospectus.

See ¶ 1451, "Securities Act—Definitions" division; ¶ 3101, "Securities Act—Registration" division; and ¶4001, "Securities Act—Prospectuses" division, Volume 1.

Securities Act—Sale of Securities—Prospectus Required—Transactions Between Broker-Dealers.—A sale of securities executed between broker-dealers is fully regulated by the Securities Act of 1933 and such a transaction must be accompanied by an official prospectus. The purchaser of securities here, defending an action for breach of the contract of sale, asserted that no official prospectus accompanied the delivery of the shares. The seller, along with its broker-dealer, argued that the transaction involved only broker-dealers, not the public, thereby extracting the sale from the requirements of the Securities Act and placing it within the exclusive realm of the Securities Exchange Act of 1934. The court looked to Section 5 of the Securities Act for the basis for coverage of the Securities Act and found that it pertained to transactions involving any person, with person defined in Section 2(2) as meaning "an individual, a corporation, a partnership, an association, etc." According to the court, Section 5 covers transactions between brokers, and therefore, an official prospectus was needed to complete a legal sale of securities.

See ¶ 1075; "Securities Act—Definitions" division; ¶ 3101, "Securities Act—Registration" division; and ¶ 4001, "Securities Act—Prospectuses" division, Volume 1.

Securities Act—Prospectuses and Communications—Misrepresentations and Nondisclosures—Status of Underwriter.—The failure to disclose in a prospectus the status of an underwriter may literally violate Section 12(1) of the Securities Act of 1933, through noncompliance with Section 10(a), however, statutes such as Section 12 will not be interpreted so as to eliminate the use of any subdivision, such as Section 12(2). A purchaser of securities seeking to avoid a contract claimed that the seller violated Section 12(1) by not including in a prospectus the name of the seller's broker-dealer which allegedly qualified as an underwriter of the securities subject to the sale. Section 12(1) requires compliance with Section 5, which in turn requires of a prospectus compliance with Section 10(a). Section 10(a) requires the inclusion of such information in a prospectus as is found in the registration statement. The names of all underwriters are required for the registration statement. Knowledge and materiality are irrelevant for finding a violation of Section 12(1). The court found that Section 12(2) applied to those situations where the prescribed procedures are properly followed but where the documents employed do not satisfy the standards dictated, the "finer" violations rather than the "grosser" violations of Section 12(1).

See ¶ 3101, "Securities Act—Registration" division; ¶ 4001, "Securities Act—Prospectuses" division; and ¶ 4735, "Securities Act—Liabilities" division, Volume 1.

Exchange Act—Distribution of Securities Subject to a Registration Statement—Manipulative Devices—Sale to Market Maker.—A purchaser of securities does not participate in a distribution subject to the provisions of Rule 10b-6 under Section 10(b) of the Securities Exchange Act of 1934 if the purchase is made for resale by the purchaser in the ordinary course of its business and its purchase constitutes, in the aggregate, less than 2% of the offering. The purchaser sought to avoid a contract to purchase securities on the grounds that the sale was a distribution of registered stock in violation of Rule 10b-6. In order for the purchaser to successfully avoid the contract, the court determined that a finding must be made that the sale of the securities by the issuer constituted a distribution, and this finding was made. A further finding was also required. The activities of the purchaser must constitute participation in the distribution. The amount of stock involved in the purchase and the stated purpose of the purchase convinced the court that the purchaser was not a participant in the distribution and not entitled to a summary judgment on its claim that it suffered damages as a result of violations of Rule 10b-6.

See ¶ 22,721 and 22,726 "Exchange Act—Manipulations" division, Volume 2.

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Byrnes v. Faulkner, Dawkins & Sullivan

Securities Act—Sale of Securities—Cancellation of Contract—Prospectus Delivery Requirement Implying a Right to Rescind.—A purchaser of securities has no right to cancel a contract of sale or rescind the purchase merely on the receipt of the prospectus. The purchaser claims that inherent in the prospectus delivery requirement of Section 5(b)(2) of the Securities Act of 1933 is an implied right to rescind. Rescission of a sale of securities was noted by the court as provided for in Section 12 of the Securities Act, but only in the specific circumstances of a violation of Section 5 or where material misrepresentations existed. The fact that a sale is completed when a prospectus is simultaneously delivered with the shares does not give rise, in the court's opinion, to another specified circumstance under Section 12. The court further pointed out that no purchaser is compelled by any statutory provision to bind himself to a purchase of securities without first examining a prospectus.

See ¶ 3101, "Securities Act—Registration" division; and ¶ 4735, "Securities Act—Liabilities" division, Volume 1.

Regulation T—Alleged Failure to Liquidate Account Promptly—Violation Depending on Improper Extension of Credit.—A purchaser of securities, though a market maker, may claim that a broker-dealer violated Regulation T of the Board of Governors of the Federal Reserve Board by not liquidating its account promptly, if the purchaser received credit from the broker-dealer improperly. Here, the purchaser owes the purchase price of securities to the seller, through the seller's broker-dealer. The broker-dealer did not extend any credit to the purchaser. The court found that if credit had been extended, it was done by the seller and not the broker-dealer, and therefore, no violation of Regulation T could be found.

See ¶ 22,001 and 22,201, "Exchange Act—Margin—Borrowing Restrictions" division, Volume 2.

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Hall, Dickler, Lawler, Kent & Howley, Gerald A. Kaufman of counsel, New York, New York, for Tobey & Kirk, Counterclaim Defendant.

Securities and Exchange Commission, Lawrence E. Nerheim, Paul Gonson, Charles E. H. Luedde, Susan P. Starling of counsel, Washington, D. C. as *Amicus Curiae*.

WERKER, District Judge: The original complaint in this case was filed by Thomas J. Byrnes and Francis R. Santangelo ("Byrnes") against Faulkner, Dawkins & Sullivan ("Faulkner") and Singer & Mackey, Inc. ("Singer") in Supreme Court, New York County alleging breach of contract. The complaint alleged that on June 7, 1971, Byrnes made a contract to sell, pursuant to a registration statement, 44,000 shares of the common stock of White Shield Corporation ("White Shield") to Faulkner and Singer but that Faulkner and Singer repudiated the contract without just cause. A more complete statement of the underlying facts and the prior history of the case are contained in an earlier opinion written by the Honorable Judge Murray Gurfein, now Circuit Court Judge, reported at 362 F. Supp. 864 (S. D. N. Y. 1973).

In that opinion, Judge Gurfein dismissed for lack of subject matter jurisdiction an action brought by Byrnes for a judgment declaring that the affirmative defenses asserted by Faulkner in the state court action were insufficient as a matter of law. However, Judge Gurfein did find that federal jurisdiction existed over the counterclaims which Faulkner asserted in its answer to Byrnes' action under § 17 of the Securities Act of 1933 ("1933 Act") and § 10 of the Securities Exchange Act of 1934 ("1934 Act").[1] Judge Gurfein granted Byrnes leave to answer the counterclaim of Faulkner and to assert his own counterclaim, suggesting that the breach of contract claims which formed the basis of the original suit would be cognizable in federal court as compulsory counterclaims under the Federal Rules of Civil Procedure, Rule 13(a).

[1] It should be noted here that Singer withdrew from its answer in the federal action all of its counterclaims asserted by it in the state court action. Judge Gurfein therefore dismissed the action as to it.

Opinion # 43960, Granting and Denying Summary Judgment

Following this decision Faulkner did not submit additional papers but relied on its original answer as filed. Byrnes answered Faulkner's counterclaims and filed its own counterclaims. Faulkner's original answer had also stated two counterclaims against Tobey & Kirk, Byrnes' broker, which Tobey & Kirk answered without asserting any counterclaims. Although technically the designation of the parties as plaintiff and defendant should be changed to indicate their current posture, each of the parties has continued to use the original designation. To avoid confusion, the court has also adopted this nomenclature. Thus, Byrnes and Santangelo are hereinafter referred to as plaintiffs and counterclaim-defendants; Faulkner is the defendant and counterclaim-plaintiff; Tobey & Kirk is also a counterclaim-defendant.

The parties have made cross motions. Byrnes moved to dismiss all of Faulkner's affirmative defenses and counterclaims and for summary judgment on Byrnes' prayer for a declaratory judgment. Faulkner moved for summary judgment on all of its affirmative defenses except the first and sixth, on its first counterclaim, and on Byrnes' counterclaim. Tobey & Kirk moved for summary judgment dismissing Faulkner's counterclaims against it. Since Tobey & Kirk's motion incorporated by reference the memorandum submitted by the plaintiffs in support of their motion and provided no additional independent authority each of the motions with respect to dismissal of Faulkner's Second and Third Counterclaims will be treated as one motion made by all counterclaim-defendants.[2]

Faulkner's First Affirmative Defense and Third Counterclaim

Faulkner's First Affirmative Defense and Third Counterclaim assert that Tobey & Kirk represented to it that the shares of White Shield which Faulkner agreed to buy were not part of a registered distribution. Faulkner asserts further that in agreeing to buy the shares, it relied on that representation which was false and fraudulent when made and in violation of § 17 of the 1933 Act[3] and § 10(b) of the 1934 Act.[4] Faulkner raises this as a defense to plaintiffs' claim and also seeks to recover damages for the expenses incurred and profit lost on the cancelled resale to Singer & Mackey.

The plaintiffs seek summary judgment on this defense and counterclaim on the ground that there are no material issues of fact to be tried. They assert that the testimony of all of the parties to this transaction negates any thought that fraudulent representations were made as to the status of the stock offered to Faulkner. Faulkner, on the other hand, contends that there were fraudulent and material misrepresentations made, that the facts are in sharp dispute, and that summary judgment with respect to this defense is inappropriate.

Section 17 of the 1933 Act makes it unlawful for any person selling securities to engage in any practice which operates as a fraud upon the purchaser. Section 10(b) of the 1934 Act makes the use of a deceptive device in connection with the purchase or sale of securities unlawful. These sections cover transactions in the over-the-counter market. *American Bank & Trust Co. v. Barad Shaff Securities Corp.*, 335 F. Supp. 1276 (S. D. N. Y. 1972).

The parties seem to agree, as does the court, that failure to disclose the fact that the stock being sold was, in fact, registered * stock would be a material and fraudulent omission in violation of Section 17 of the 1933 Act and Section 10(b) of the 1934 Act. *Cf. Vohs v. Dickson*, 495 F. 2d 607 (5th Cir. 1974). This is particularly true in light of *In the Matters of Jaffee & Co.* [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,805 (1970), discussed later in this opinion, in which the SEC required a market maker to cease all open-market purchases of a security if it purchased any shares which were being sold as part of a distribution. The issue is whether in fact there was such an omission.

The parties have each cited several sections of the testimony taken at depositions and assert that such testimony confirms or refutes the allegations on disclosure. The evidence before the court clearly is in-

[2] The court feels constrained to make some comments about the submissions which have been received with respect to these motions. Excluding the affidavits and exhibits the parties originally filed almost 600 pages of motion papers. While the motions were *sub judice* nearly 50 additional pages in the form of correspondence and amended submissions were received. It is the court's view that most of the papers were needlessly verbose and that the repeated bombardement of the court with additional material, heated correspondence, and reiterations of prior material served only to extend an already protracted proceeding

[3] 15 U. S. C. § 77q.

[4] *Id.* § 78j(b).

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*Language following "registered" to "Vohs" was amended to read: "is a material omission."

Opinion # 43960, Granting and Denying Summary Judgment

conclusive. The issue is largely a question of credibility, a matter which cannot be determined on the pleadings in a motion for summary judgment. *Cross v. United States*, 336 F. 2d 431 (2d Cir. 1964); *Hirsch v. Archer-Daniels-Midland Co.*, 258 F. 2d 44 (2d Cir. 1958).

In addition, the plaintiffs argue that Faulkner, which believed it would be dangerous for a market maker to buy stock which was being sold as part of a distribution, was under an obligation to inquire as to the status of the stock being sold. The plaintiffs cite *In the Matters of Jaffe & Co., supra*, in support of their position. In that case, where the trader employed by a market maker had received a copy of a prospectus of the stock being sold, the SEC held that the market maker "should have inquired into the status of the offering." *Id.* at 83,858. That case is not dispositive of this one, however, since there is direct evidence that Faulkner did not receive a copy of the White Shield prospectus prior to the sale.

Because the facts are in sharp dispute as to both the fact of omission and extent of Faulkner's inquiry as to the status of the stock, plaintiffs' motion for summary judgment on Faulkner's First Affirmative Defense and Third Counterclaim* is denied.

SECOND AFFIRMATIVE DEFENSE

All parties have sought summary judgment with respect to Faulkner's Second Affirmative Defense. That defense asserts that the sale of White Shield stock was illegal because the written comparison[5] sent to Faulkner by Tobey & Kirk constituted a prospectus as defined in § 2(10) of the 1933 Act which did not conform to the requirements of § 10 of that Act and because that comparison was not accompanied or preceded by a statutory prospectus as required in § 5(b) of that Act. The plaintiffs acknowledge that no prospectus was sent to the defendant but assert that the requirements of Section 5(b) do not apply to transactions between broker dealers and that in any event, the comparison Tobey & Kirk sent does not constitute a prospectus for the purposes of the 1933 Act.

Section 5(b)(1) of the 1933 Act[6] makes it unlawful for any person, directly or indirectly—(1) to make use of any means . . . of . . . communication in interstate commerce . . . to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed . . . unless such prospectus meets the requirements of section 77j of this title.

There is no question that the comparison sent by Tobey & Kirk does not meet the requirements of section 77j[7] which requires a prospectus to contain the information contained in the registration statement.

The real issue is whether the comparison is a prospectus at all such that the requirement in section 5(b) is even applicable. Section 77b(10) of 15 U. S. C.[8] defines the term prospectus as 'any . . . communication, written . . . which . . . confirms the sale of any security." Taken literally, the statute which is broad and inclusive, would seem to include a comparison sent by one broker to another, confirming the sale of a security.

The plaintiffs, however, have raised several objections to this reading. First, they argue that the 1933 Act in which the above-quoted language is contained was intended to regulate transactions between broker dealers and their customers, *i.e.*, the public, not the activities among broker dealers themselves. That relationship, the argument goes, is fully regulated by the 1934 Act. With that assertion, this court cannot completely agree.

The court recognizes that the primary purpose of the Act is to protect the investing public. *Wilko v. Swan*, 346 U.S. 427 (1953); *Securities and Exchange Commission v. Ralston Purina Co.*, 346 U. S. 119 (1953); *Berko v. Securities and Exchange Commission*, 316 F. 2d 137 (2d Cir. 1963). However, the statute itself seems to negate the plaintiff's argument by its own language.

Section 5 of the 1933 Act[9] which is the heart of the statute makes it unlawful for *any person* to do any of the acts therein prohibited. Section 2(2) of the Act[10] defines "person" to mean "an individual, a corporation, a partnership, an association, etc." The plaintiffs admit that neither they nor

[5] The terminology involved in this defense is somewhat tricky. For the purpose of clarity, unless the context indicates otherwise, the word "comparison" as used in this opinion will refer to the communication exchanged by brokers as required by § 9 of the NASD Uniform Practice Code, and the word "confirmation" will refer to the communication sent by a broker to his customer confirming the sale of securities for the customer's account.

[6] 15 U. S. C. § 77(e)(b)(1).

[7] § 10 of the 1933 Act.

[8] § 2(10) of the 1933 Act.

[9] 15 U. S .C. § 77e.

[10] *Id.* § 77b(2).

*Language "and Third Counterclaim" deleted by amendment.

Tobey & Kirk is excluded from the reach of that definition. Thus they concede that it would have been unlawful to deliver the shares of White Shield stock unaccompanied by an official prospectus. Section 5 of the Act admittedly covers transactions between brokers.

Further evidence that the 1933 Act did not intend to cover only the relationship between brokers and the public can be found in Section 4.[11] Section 4 provides that certain transactions shall be exempted from the application of Section 5. There is no such exemption *per se* for transactions between two broker-dealers. Surely if the Congress intended to relieve these parties of responsibility under the 1933 Act, it would have done so in this section. The court therefore concludes that the plaintiffs cannot avoid the requirements of Section 5(b) on the ground that Tobey & Kirk and Faulkner are both broker dealers.

Second, the plaintiffs argue that an examination of the legislative history of Section 2(10)[12] supports its contention that the term prospectus was not intended to include a comparison sent from one broker dealer to another. The original act defined a prospectus as a "communication . . . which offers any security for sale." In 1954, the statute was amended to include within the term prospectus, any communication which "confirms the sale of any security." Both the Senate and the House reports explain that the addition of these words was "to avoid any implication of departure from settled interpretations that confirmations are 'prospectuses'." S. Rep. No. 1036, 83d Cong., 2d Sess. 12 (1954); H. R. Rep. No. 1542, 83d Cong., 2d Sess. 21 (1954). Both reports contain citations to SEC Securities Act Release No. 2623 (July 25, 1941).

The release, an opinion by the General Counsel, explains what he considers to be the scope of the term prospectus:

> "Under the Act a 'prospectus' includes every kind of written communication which attempts or offers to dispose of, or solicits an offer to buy, a security for value, or which constitutes a contract of sale or disposition of a security for value. If the term 'prospectus' is construed in accordance with its language and spirit, it must in my opinion be read to cover any document which is designed to procure orders for a security, or to effectuate the disposition of a security, whether or not the document purports on its face to offer the security for sale, or otherwise to dispose of it for value." *Id.* at 3129.

The release continues by giving concrete examples of situations which might arise and by explaining what the prospectus delivery requirements are in each case. The plaintiffs place heavy reliance on examples 7 through 10 which purport to relieve a broker of the requirements of delivering a prospectus in circumstances analogous to those of the case at bar.[13]

Those questions and answers do not provide the plaintiffs with the authority they seek for two reasons. They deal on their face with brokers' transactions as exempted from compliance with section 5 by the terms of section 4. The trade in question is not such a transaction. Second, the questions and answers relied upon have in part been superseded. CCH FED. SEC. L. REP. ¶ 3195 at 3131 n.2.

The plaintiffs seek support from this series of questions to illustrate the un-

[11] *Id.* § 77d.

[12] *Id.* § 77b(10).

[13] *Question 7.* Richard Roe telephones John Doe, his broker, and states that he has certain warrants which he would like John Doe to sell for his account. John Doe does so, and sends him a confirmation of the transaction. Must John Doe at the same time send him a copy of the prospectus?

Answer. No. In confirming a sell order on a brokerage basis, John Doe is not within the prospectus requirements of the Act.

Question 8. Pursuant to the sell order received in Question 7, John Doe sells Richard Roe's warrants to Henry Hoe, another dealer, who purchases for his own account. Must John Doe, in confirming the sale to Henry Hoe, or in delivering the warrants to him, send him a copy of the prospectus?

Answer. No. John Doe, in making the sale, is completing the execution of an unsolicited brokerage order, and therefore is exempt from the prospectus requirements.

Question 9. John Doe writes to his customer Richard Roe, whom he knows to be a stockholder of American Telephone and Telegraph Company and offers to sell for him the warrants he has received. Must John Doe send Richard Roe a formal prospectus with his letter?

Answer. No, since he is offering to sell *for* him, not *to* him.

Question 10. As a result of the letter described in Question 9 Richard Roe gives John Doe a sell order, and John Doe sells the rights to Henry Hoe. When he mails the warrants to Henry Hoe, must he send a copy of the prospectus with them?

Answer. Yes. The transaction, although on a brokerage basis, results from a solicitation, and consequently the prospectus requirements are applicable to John Does' sale to Henry Hoe. *Id.* at 3130-31. (emphasis in original) (footnotes omitted).

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Opinion # 43960, Granting and Denying Summary Judgment

solicited nature of the transaction in an attempt to avoid the application of the definition of the term "prospectus" to the comparison sent by Tobey & Kirk. The theory propounded is that in adding the words 'or confirms the sale of any security" the Congress intended to encompass only those situations where some act by the seller could be considered a solicitation to buy the stock.

There is some support for this view had this transaction been conducted as a result of a customer's solicitation. Questions 7 through 10 indicate that where a broker sells securities to another broker at the request of the selling broker's customer, the transaction is unsolicited and therefore exempt from section 5.

Questions 8 and 10 were superseded by 17 C. F. R. § 230.154. Under that regulation, a broker was deemed not to solicit an order when, in response to a quotation submitted by a dealer in the "sheets," he inquired of that dealer as to his interest in purchasing. Such a solicitation within 60 days of the insertion of a bid in the sheets was deemed not to disqualify an otherwise exempt broker's transaction under section 4. SEC Securities Act Release No. 131 (March 13, 1934).

Rule 154 was subsequently rescinded when Rule 144 was adopted.[14] Although the Rule is directly concerned with the public resale of restricted securities without registration, the new rule retained a similar provision regarding the availability of a broker's exemption to a broker who offers to sell restricted securities to a broker or dealer who had indicated an interest in that security during the preceding 60 days. SEC Securities Act Release No. 5223 (January 11, 1972). Presumably, such an indication of interest would include the insertion of a bid in the sheets. Rule 144 deems such a transaction as unsolicited.

There is a basic problem with this analysis, as applied to the instant case. Each of the releases which dealt with the concept of unsolicited orders did so in the context of a broker's exemption from section 5, not in consideration of whether a particular communication constituted a prospectus. Presumably, the sending of a document that clearly was a prospectus would not alter the determination as to whether or not a particular transaction was exempt. The point of these releases is that offering to sell a security to a broker who has inserted quotations in the sheets does not constitute a solicitation, regardless of the form in which that offer is made. That still does not contradict the language in section 2(10) that defines a prospectus as any written communication which confirms the sale of a security irrespective of the status of the transaction in which it is used. The Court therefore rejects the argument, based on questions 7 through 10 of the General Counsel's opinion that a comparison does not constitute a prospectus for the purposes of Section 2(10).

There is one statement, however, in the Senate Reports cited above that lends stronger support to the position taken by the plaintiffs that the comparison sent by Tobey & Kirk to Faulkner, is not to be deemed a prospectus for purposes of the 1933 Act. The report discusses certain amendments to the 1933 Act made in 1954 and in the context of explaining an amendment which shortened the period during which transactions, by dealers not participating in the distribution, were not exempt from the provisions of section 5 of the Act, the report included this statement: "Section 5(b) of the Securities Act requires that all persons, unless exempt, use prospectuses in connection with the sale *to the public* of a registered security." S. Rep. No. 1036, 83d Cong., 2d Sess. 6 (1954) (emphasis added). It can certainly be argued that that is a recognition, at least by the Committee on Banking and Commerce, as constituted on February 25, 1964* that the prospectus delivery requirement in section 5(b)(1) was not intended to include comparisons exchanged by brokers. Nonetheless, this is insufficient authority to counteract what is otherwise clear statutory language. And it is a well-known maxim that the party who seeks to contradict the clear and unambiguous language of a statute must bear the burden of convincing the court that the interpretation he proposes is the correct one.[15]

A third basis upon which the plaintiffs argue that the comparison sent by Tobey & Kirk does not constitute a prospectus is the inconsistency between the regulations regarding the contents of comparisons are prescribed at 17 C. F. R. § 240.15c1-4 (1975) and the rule covering broker confirmations promulgated by the National

[14] SEC Securities Act Release No. 5223 (Jan. 11, 1972).

[15] *Commissioner of Internal Revenue v. Barclay Jewelry, Inc.*, 367 F. 2d 193 (1st Cir. 1966).

*Corrected to read "1954".

Association of Securities Dealers (NASD) in sections 9 through 11 of the Uniform Practice Code. That is an argument which in this court's opinion, is devoid of merit.

First, it would seem to be stating the obvious to point out that the documents which meet the definition of prospectus in section 2(10) of the Act will be of infinite variety. It can hardly be argued that a certain document is not a prospectus merely because it is different from a second document which clearly is a prospectus. Thus, merely because a broker's comparison is not the same as a confirmation to a customer which all of the parties admit is a prospectus within the meaning of the Act is not to say that it therefore cannot be a prospectus.

Furthermore, the regulations cited by the plaintiffs to describe the contents of a confirmation are not at all relevant to the definition of prospectus. Section 15(c)(1) of the 1934 Act[16] directed the Commission to enact "rules and regulations (to) define such devices or contrivances as are manipulative, deceptive, or otherwise fraudulent" for the purposes of that Act. It was pursuant to this authorization that the Commission promulgated 17 C. F. R. § 240.15c1-4 (1975). That regulation defines as fraudulent, manipulative or deceptive

> "any act of any broker or dealer designed to effect with or for the account of a customer any transaction in... any security... unless such broker or dealer, at or before the completion of each such transaction, gives or sends to such customer written notification disclosing"

certain facts regarding the capacity in which the broker or dealer is functioning in that particular sale. It should be apparent that these sections work independently of each other. If a broker sent a confirmation which clearly violated this rule but which was accompanied by a prospectus that complied with section 10 of the 1933 Act, he would not violate section 5(b)(1) of that Act. Similarly, if he sent a confirmation which complied in full with the disclosures mandated by Rule 15c1-4 but which was not accompanied or preceded by a section 10 prospectus, he would be in violation of Section 5 of the 1933 Act. Thus it is the opinion of this court that it would be erroneous to make any assumptions about the category of documents which fall under the term prospectus by referring to the description of the confirmation contained in 17 C. F. R. § 240.15c1-4.[17]

It is for that same reason that this court will not automatically exclude from the term "prospectus" that document which is described in §§ 9-11 of the NASD Uniform Practice Code as a confirmation or comparison. The Code prescribes the contents of the comparisons to be exchanged by brokers and the time by which they must be sent. It must be apparent here also that this regulatory scheme operates independently of section 5(b)(1) of the 1933 Act. Assuming *arguendo* that a comparison as defined in §§ 9-11 of the NASD Uniform Practice Code does constitute a prospectus for the purposes of section 2(10) of the 1933 Act, it is clear that it is possible to violate the Code without violating Section 5 and vice versa. Thus, reference to the NASD rules does not, in this court's view, resolve the question posed by the defendant's Second Affirmative Defense.

The plaintiffs also argue that compliance with the NASD time schedule and the Section 5 prospectus delivery requirements is virtually physically impossible. Section 9 of the Practice Code requires the confirmation to be sent "on or before the first full business day following the date of the transaction." The plaintiffs argue that it is likely that the final prospectus will not be available by the time the selling broker must send the comparison.

That argument puts the procedural cart before the statutory horse. If the 1933 Act prohibits the sending of a communication which confirms the sale of a security unless accompanied or preceded by a final prospectus, it is not a defense to a violation of that statute to hold up the NASD Manual which requires the comparison to be sent one day after the sale. It will be the responsibility of selling brokers to comply with both provisions by delaying the consummation of any sale to another broker until the prospectus delivery requirements can be met within the time allowed by NASD.

In an *amicus* brief which the SEC filed in this action it argues that plaintiffs' fears

[16] 15 U. S. C. § 78o(c)(1).

[17] By the same token, it is irrelevant for the purposes of section 2(10) of the 1933 Act that 17 C. F. R. § 240.15c1-1 excludes brokers and dealers from the term customer. Such an exclusion merely harmonizes the regulation under the 1934 Act with the NASD rules and avoids the finding otherwise compelled that it is a manipulative device for a broker to confirm a transaction entered into with another broker, by using the comparison defined by sections 9-11 of the NASD Uniform Practice Code.

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as to the unavailability of a final prospectus are spurious, and it refers to Rule 153 which requires that an adequate number of copies of a prospectus covering a security listed on a national securities exchange be available at the exchange with respect to transactions in that security on that exchange. It is unclear to the court what relationship that has to the problem raised by the plaintiffs regarding over-the-counter transactions and it rejects that as a basis for dismissing the plaintiffs' argument.

Byrnes and Santangelo seek to avoid the effect of any adjudged failure of Tobey & Kirk by disassociating themselves from the acts of their broker. They argue that they personally never sent any written confirmations to the defendant and that as far as they are concerned, the prospectus delivery requirements did not become effective as to them until they actually deliverd the securities themselves. They argue that they should not be charged with any failure by Tobey & Kirk to fulfill its obligations under the 1933 Act.

It is accurate to say that had Byrnes and Santangelo sold the securities without the assistance of a broker and had they themselves not sent any written confirmation to evidence the making of the contract, they would not have had to deliver a prospectus to Faulkner until they actually physically delivered the shares of White Shield. But that is not the way the transaction took place, and the plaintiffs will not be heard to argue that they could have avoided an unfavorable result by structuring their affairs differently.

The Second Affirmative Defense does not seek to impose liability on Byrnes and Santangelo. Rather, it is asserted as a defense against an action for damages for breach of contract. It was established in the case of *Kaiser-Frazer Corp. v. Otis & Co.*, 195 F. 2d 838 (2d Cir.), *cert. denied*, 344 U. S. 856 (1952), that a contract which violates the 1933 Act is unenforceable. In that case the court found that a prospectus issued by the plaintiff was misleading and therefore violated 15 U. S. C. §77e(b) if used in connection with a public offering. As a result, the court found the defendant not liable for breach of its contract with the plaintiff to underwrite the issue. "[A] contract which violates the laws of the United States and contravenes the public policy as expressed in those laws is unenforceable." *Id.* at 843. *Cf. Garfield v. Strain*, 320 F. 2d 116, 119 (10th Cir. 1963). See also *Schillner v. H. Vaughan Clarke & Co.*, 134 F. 2d 875 (2d Cir. 1943) in which the court held that "[i]n imposing by section 12(1) civil liability upon 'any person who * * * sells a security in violation of section 5' we cannot doubt that the liability was intended to embrace all transactions made unlawful by section 5." *Id.* at 878. *See also* III L. Loss *Securities Regulation* 1797-98 (1961). It is true that the remedies authorized by § 12 include only "recover[y of] the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or ... damages if he no longer owns the security." However, as Professor Loss points out, "[t]here would be little point in giving the seller an action on his contract only to have the buyer put things *in statu quo ante* by counterclaiming or bringing his own action under ... § 12." III Loss, *supra* at 1798.

It might be considered harsh to deny the plaintiffs the benefit of a contract because the court is imposing a prospectus delivery requirement which heretofore has never been judicially directed. "However, even where a [litigant] is successful in showing that it has followed a customary course in the industry, the first litigation of such a practice is a proper occasion for its outlawry if it is in fact in violation." *Chasins v. Smith, Barney & Co.*, 438 F. 2d 1167, 1171 (2d Cir. 1970). Therefore, there being no issue of fact to be tried and defendant being entitled to judgment as a matter of law, the plaintiffs having failed to meet the burden of convincing the court to disregard the literal language of the statute, summary judgment is hereby granted on the Second Affirmative Defense and on the First Counterclaim to the extent it relates to this defense.

THIRD AFFIRMATIVE DEFENSE

The defendant asserts as an affirmative defense the failure of White Shield to disclose in its prospectus that Tobey & Kirk was an underwriter as required by §§ 7 and 10 of the 1933 Act.[18] The plaintiffs dispute this on three grounds and seek to strike the defense as a sham. First, they argue that the prospectus makes an adequate disclosure by stating that the brokers through which the shareholders were selling their stock might be deemed to be underwriters.

[18] 15 U. S. C. §§ 77g, 77j.

Second, they assert that even if Tobey & Kirk were an underwriter, the plaintiffs failed only to disclose a conclusion of law about which Faulkner had all of the relevant facts sufficient to draw its own conclusion. Thus, they claim there to be no failure to disclose a material fact. Third, it is the plaintiffs' contention that there is substantial doubt as to Tobey & Kirk's status as an underwriter. They assert that as soon as that status became clear that they supplied a sticker amendment to the prospectus, a procedure which the SEC had specifically approved for their use.

The defendant rejects the plaintiffs' contentions on several grounds. First, it argues that the SEC permitted the use of sticker amendments only because the plaintiffs misrepresented the facts. It is the defendant's contention that it was clear several months prior to the publication of the prospectus that Tobey & Kirk were, in fact, underwriters of the proposed distribution and that had the SEC been apprised of that fact, it would have required disclosure of that fact. Second, it rejects the suggestion that Byrnes and Santangelo might not have been statutory underwriters because the plaintiffs have asked the court to infer that the plaintiffs obtained their stock for investment purposes only from the fact that they held their stock for three years. The defendant maintains that since the plaintiffs purchased their shares from a controlling person, they are deemed to purchase them with a view towards distribution and therefore cannot escape the adverse results resulting from their failure to identify Tobey & Kirk as an underwriter. Furthermore, the defendant seeks to avoid the contract under section 12(1) of the 1933 Act, thereby making the issues of materiality and knowledge irrelevant to the determination of its rights. Finally, it argues that since it does not attempt to impose any liability on the plaintiffs for their failure to disclose the identity of Tobey & Kirk as an underwriter, the issues of good faith and reliance should not be considered.

Because of the view this court takes as to the section of the statute which properly applies to this defense, it is unnecessary to reach most of the issues raised by the parties. The defendant argues that use of the White Shield prospectus which failed to identify Tobey & Kirk as an underwriter is a violation of § 12(1) of the 1933 Act, thereby making knowledge and materiality irrelevant. The plaintiffs assert that § 12(b) * is the portion of the statute which provides the appropriate remedy. For the purposes of this argument only, the court will assume that Tobey & Kirk was an underwriter of this distribution and that the plaintiffs knew that fact in time to include it in the original prospectus.

Section 12 of the 1933 Act reads, in relevant part as follows:

> Any person who—
>
> (1) offers or sells a security in violation of section 77e of this title, or
>
> (2) offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus. . . . which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission). . . .
>
> shall be liable to the person purchasing such security from him. . . .

It is the defendant's claim that using a prospectus which omits a material fact is a violation of subdivision (1) of this section. There is a logical argument which does yield that result. Section 77e outlaws the use of any prospectus which fails to conform to section 77j of the Act. Section 77j requires a prospectus to include, with certain exceptions not relevant to this contention, the information contained in the registration statement of that security. Section 77aa(5)[10] requires a registration statement to include the name and address of the underwriters. Thus the conclusion is that by omitting from the prospectus any information required to be included, the seller has *ipso facto*, violated subdivision (1) of section 12.

The problem in this court's view is that such an interpretation of the statute virtually eliminates any use for subdivision (2). If all omissions from a prospectus result in a violation of subdivision (1) there is no need to use subdivision (2). Since this court follows the rule that wherever possible statutes should be interpreted to avoid the conclusion that any

[10] Schedule A, Item 5 of the 1933 Act.

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*Corrected to read "12(2)".

Opinion # 43960, Granting and Denying Summary Judgment

portion of them is surplusage,[20] the interpretation urged by the defendant is rejected.

Rather, it is the veiw of this court that these two subdivisions were enacted to serve two distinct functions. Subdivision (1) creates virtually *per se* liability for anyone who commits the "grosser" violations which result from an absolute disregard of the mandate of section 5. Thus, subdivision (1) is violated where a person sends a security or attempts to sell a security through the use of interstate commerce or the mails if a registration statement is not in effect as to that security. That subdivision is also violated if a registered security is sent in interstate commerce unless accompanied or preceded by an official prospectus. That is the scope of section 12(1) of the 1933 Act. *See* III L. Loss, *Securities Regulation* 1692-98 (1961).

Subdivision (2) which makes the burden of proof more stringent reaches the "finer" violations, *i. e.*, where the prescribed procedures are properly followed but where the documents employed do not satisfy the standards dictated.

The defendant cites *Securities & Exchange Commission v. Manor Nursing Centers, Inc.*, 458 F. 2d 1082 (2d Cir. 1972), in support of their interpretation. But this court concludes that that case is distinguishable from the one at bar. In that case, facts which became known subsequent to the effective date of the registration statement were not incorporated into it by amendment. The district judge found that failure to do so resulted in the omission from the registration statement of certain items required to be included. *Securities & Exchange Commission v. Manor Nursing Centers, Inc.*, 340 F. Supp. 913, 934 (S. D. N. Y. 1971). On appeal, the Second Circuit held that where subsequent developments make the information false and misleading, it is a violation of section 5(b)(2) to deliver securities accompanied by a prospectus that has not been updated. The court held that the prospectus therein delivered failed to meet the requirements of § 10(a).

It is admitted that the original prospectus stated that the brokers acting for the selling shareholders might be deemed to be underwriters within the definition of that term in the 1933 Act. Furthermore, on June 18, 1971, White Shield filed a sticker amendment identifying Tobey & Kirk as one of the brokers who might be deemed an underwriter. If in fact Tobey & Kirk were an underwriter, it would seem to write § 12(b) right out of the statute to find that such an omission in the original prospectus was a violation of § 10(a) thereby making the sale illegal, *per se*, under § 12(a).* The discrepancy between the facts as presented in the prospectus prepared for the *Manor Nursing Centers* distribution and the facts as they actually existed was so tremendous that a failure to amend the prospectus could be deemed an utter failure to provide a prospectus which conformed to § 10(a). Such an argument cannot be applied to the circumstances of this case.

In order for the defendant to rely on the Third Affirmative Defense, two issues raised by the papers must be resolved: (1) was Tobey & Kirk in fact an underwriter and (2) if it was, were the defendants aware of that fact, thus foreclosing their reliance on this section as a basis for avoiding the contract. It is the court's view that these are issues of fact that cannot be resolved on a motion for summary judgment. Each of the parties, drawing opposing inferences from the facts, argue that the facts are not in dispute and that it is entitled to judgment as a matter of law. In view of the court's conclusion that § 12(b) * is the applicable subdivision of the statute for determining the issue of liability for the alleged omission from the White Shield prospectus, the issue of knowledge is central to a determination. Furthermore, the court requires additional facts on the status of Tobey & Kirk. The court therefore denies both motions for summary judgment on defendant's Third Affirmative Defense.

Before leaving this matter, however, the court feels compelled to answer one further contention advanced by the plaintiffs: that § 19(a) of the 1933 Act[21] or § 23(a) of the 1934 Act[22] immunizes the plaintiffs from any violation of § 12(a) or (b) because they relied on the Commission's authorization in phrasing the statement on underwriters attacked by the defendant.

First, the defendant raises a significant factual question as to whether all of the

[20] *McDonald v. Thompson*, 305 U. S. 263 (1938); *Wilderness Society v. Morton*, 479 F. 2d 842 (D. C. Cir.), *cert. denied*, 411 U. S. 917 (1973); *United States v. Bamberger*, 452 F. 2d 696 (2d Cir. 1971), *cert. denied*, 405 U. S. 1043 (1972).

[21] 15 U. S. C. § 77s(a).

[22] *Id.* § 78w(a).

*Sections 12(a) and 12(b) corrected, respectively, to 12(1) and 12(2).

facts relevant to Tobey & Kirk's status were in fact disclosed to the SEC. Unless that issue is resolved in plaintiffs' favor, they cannot rely on any authorization provided by the SEC. Second, it should be noted that by its own terms, the section relied on only immunizes the plaintiffs from liability imposed by either of the two Acts; it does not protect them from any defense asserted in a breach of contract action. Thus, even assuming that all of the facts were in fact disclosed by the plaintiffs to the SEC, these sections are not applicable to the current dispute. It would be a wholly different matter if having requested and received SEC direction on a particular matter, the plaintiffs were then to be found liable in damages under one of the Acts for having followed those very directions. This court finds that the protection provided in § 19(a) of the 1933 Act and § 23(a) of the 1934 Act is unavailable in this instance.

FOURTH AFFIRMATIVE DEFENSE and SECOND COUNTERCLAIM

One of the issues most sharply contested by these parties is the Fourth Affirmative Defense. The defendant contends that the sale by an issuer or underwriter of registered stock to a market maker is a manipulative device pursuant to Section 10b of the 1934 Act and Rule 10b-6 promulgated thereunder. It argues that the contract for the purchase of White Shield stock was therefore illegal and properly avoided. It is asserted that it was originally on this basis that Faulkner and Singer refused to perform the contract. This defense also serves as the basis for the defendant's Second Counterclaim. Faulkner seeks to recover its out-of-pocket expenses plus the net profit on the sales it purportedly had to cancel upon discovering that the White Shield stock was registered.

Two recent SEC decisions, *In the Matters of Jaffee & Co. ("Jaffee")*, CCH FED. SEC. L. REP. ¶ 77,805 (1970) and *In the Matter of Collins Securities Corp. ("Collins")*, SEC Securities Exchange Act Release No. 11,766 (October 23, 1975), are the focus for the arguments of each of the parties. In order to deal fully with their positions, it is necessary to discuss both cases in some detail.

In *Jaffee*, M. L. Lee & Co. ("Lee"), a broker dealer, was appointed the exclusive agent for 34 shareholders of Solitron Devices, Inc. ("Solitron") who wanted to sell their shares in a registered secondary offering. Among the selling shareholders was Wilton L. Jaffee, Jr. ("Jaffee") the principal partner in Jaffee & Company ("J. Co."). During the Solitron distribution, Greene & Company ("Greene"), a broker dealer who traded mainly for its own account entered bids, at the instigation of Jaffee, in the NASD quotation sheets, purchased Solitron stock in the over-the-counter market, and at the same time made purchases of Solitron stock that were not part of the offering. Greene had received a copy of the Solitron prospectus and thus was aware that a distribution of Solitron stock was in progress. The SEC concluded that Greene had engaged in a manipulative device in violation of Rule 10b-6 and that Lee had aided and abetted that violation when Greene bought and Lee sold it shares that were part of the distribution. The unusual and precedential aspect of *Jaffee* was its conclusion that any offering, registered pursuant to the Securities Act of 1933 was necessarily a distribution within the meaning of Rule 10b-6.

The *Collins* case involved an attempt by a registered broker dealer and a life insurance company ("Big Horn") to manipulate the price of the company's common stock. At a time when the market for the stock was extremely thin and the few quotes in the sheets ranged from 3 to 3½, the insurance company was in dire need of cash. After considering several alternatives for raising capital, the parties decided to encourage the exercise of outstanding stock purchase warrants. The problem with this means for raising cash was that the warrants were exercisable at $5.00 per share. Collins, by placing bid and asked quotations in the sheets which were one to two points higher than any of the other quotations, tried to stimulate the exercise of the warrants. When this tactic failed, it adopted a plan whereby fundamentally it exercised the warrants itself, paid the life insurance company the excessive price and took delivery of the newly issued shares. It then arranged to resell the shares to the public at the inflated prices it had originally created by inserting high bids in the sheets. Although the SEC found this activity violative of Rule 10b-6, it used this case to explicitly overrule that part of *Jaffee* which held that "any offering of securities pursuant to a registration statement automatically constitutes a distribution within the meaning of Rule 10b-6." *Collins*, SEC Securities Exchange Act Release No. 11,76

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at 256. Instead, the SEC held in *Collins* that the test articulated in *Bruns, Nordeman & Co.*, 40 SEC 652 (1961) is applicable to determine whether a sale of securities is in fact a distribution. Relying on the general lack of activity in Big Horn stock, the quantity and price of Collins' transactions in Big Horn and the fact that the number of shares offered comprised 30% of the outstanding stock, the SEC concluded that Collins had in fact participated in a distribution for the purposes of 10b-6.

Originally, Faulkner argued that the *Jaffee* rule was directly on point with the case at bar and mandated granting summary judgment in its favor. It now maintains that *Collins* should not change that result. Faulkner contends and the plaintiffs do not deny that the offering of White Shield stock constituted a distribution according to the *Bruns, Nordeman* standard. Once the existence of a distribution is proven, so Faulkner's argument goes, the *Jaffee* rule is automatically effective: any market purchase made during the participation in that distribution is violative of Rule 10b-6 as a manipulative device.

The plaintiffs had originally made three separate arguments: that the *Jaffee* case is sufficiently different so as not to control here; that even if it is on point the case does not sanction Faulkner's breach of its contract; that this court should overrule *Jaffee*. The decision in the *Collins* case has resulted in a change in this position. They argue that the impact of the *Collins* decision on the *Jaffee* rule is not as simple as the defendant claims. It is their position that in overruling the automatic determination on distributions, the *Collins* case necessarily overrules the *per se* finding of participation; rather, they argue that an inquiry must be made as to the nature and extent of the activities involved to determine whether or not there is actually "participation" in the subject distribution.

> Section 10b of the 1934 Act[23] states that
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce. .
>
> (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device. . . .

Pursuant to the authorization contained in that section, the SEC promulgated Rule 10b-6[24] which defines acts which constitute a manipulative or deceptive device. Included in that rule is a prohibition for any person

> "who has agreed to participate or is participating in such a distribution, directly or indirectly, by the use of any means . . . of interstate commerce . . . to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series . . . until after he has completed his participation in such distribution. . . .

As a preliminary matter, the plaintiffs argue that the SEC was confronted by a unique situation in *Jaffee* and that it articulated its unprecedented *per se* rule as the only available means of solving its problem. There was some evidence that Jaffee induced Greene to enter the sheets. However, by virtue of the SEC's own evidentiary rules, that evidence was admissible only against Jaffee. It is the plaintiffs' position therefore, that the SEC adopted a *per se* rule only because it could not base its finding on the manipulative intent it believed was actually motivating the parties' actions. Thus, the plaintiffs contend that *Jaffee* should not apply where the usual indicia of manipulation are not present. The only authority advanced by the plaintiffs in support of this contention is the opinion dissenting from the denial of reconsideration *en banc* in *Chasins v. Smith, Barney & Co.*, 438 F. 2d 1167 (2d Cir. 1970), in which the dissenters argued against imposition of liability under Rule 10b-5 on the ground that where there are several market makers, the fear that one of them will be able to set an arbitrary price is inappropriate.

In promulgating Rule 10b-6 the SEC itself seems to have recognized that certain transactions, although falling within the literal language of the Rule may not in fact constitute manipulative devices. Thus the Rule provides at 17 C. F. R. § 240.10b-6 (*i*) that the SEC may exempt certain transactions "as not constituting a manipulative or deceptive device or contrivance comprehended within the purpose of this section."

However, the Second Circuit in affirming the SEC's holding on Wilton Jaffee has flatly contradicted this view. The court held that

> The dangers of market manipulation that Rule 10(b)-6 was designed to eradicate

[23] *Id.* § 78j(b).

[24] 17 C. F. R. § 240.10b-6.

. . . were continually present so long as Jaffee's purchases might have artifically inflated the price of Solitron, thereby affording him an opportunity to sell his registered stock at a price higher than he would have received if the market had been permitted to seek its own level. . . . . . The rule proscribes and clearly defines a *practice* which had, prior to the adoption of the rule in 1955, been used fraudulently to distort the over-the-counter market. Where the rule applies, its prohibition is absolute. . . [T]he Commission's clear intent is to require actual manipulation or the like only to draw within the rule's ambit activity that would otherwise be exempted from it. *Jaffee & Co. v. Securities & Exchange Commission*, 446 F. 2d 387, 391 (2d Cir. 1971) (emphasis in original).

The practice to which the court was referring is the purchase of a security which is the subject of a distribution by any person who has agreed to participate or is participating in such distribution. This is the position asserted by the SEC in *Jaffee* where it said, "Rule 10b-6 defines certain conduct as manipulative *per se;* no further showing of manipulation is required in order to establish violations of the Rule." *Jaffee, supra* at 83,859. Thus, in order to find a violation of Rule 10b-6 the parties must have either committed one of the acts expressly proscribed by the Rule or committed some other act not within the ambit of the statutory language itself but which is manipulative *per se* or evidences a manipulative intent.

There is no question that Faulkner, as a market maker, would have been bidding for and purchasing and trying to sell the newly registered stock being distributed by the plaintiffs. The question is whether the purchase and resale of plaintiffs' stock constitutes the participation in a distribution which is prohibited by Rule 10b-6. The court is convinced that the sale of stock by the various White Shield shareholders did in fact constitute a distribution, pursuant to the test set out in *Bruns, Nordeman & Co.*, 40 SEC 652 (1961). Under that test, "a distribution is to be distinguished from ordinary trading transactions and other normal conduct of a securities business upon the basis of the magnitude of the offering and particularly upon the basis of the selling efforts and selling methods utilized." *Id.* at 660. *See also* Weiss & Leibowitz, *Rule 10b-6 Revisited*, 39 Geo. Wash. L. Rev. 474, 79-80 (1971) which states: "It is apparent from the Commission's decided cases that, irrespective of any other criteria relevant to the administration of other provisions of the federal securities laws, the term "distribution" in rule 10b-6 extends to any special market operations and selling activity which constitutes a departure from casual trading." But that does not conclude the inquiry because it seems to this court that, as the plaintiffs argue, the real problem is whether or not Faulkner was participating in that distribution.

The answer to this question is dependent on the meaning of the words "or is participating in such distribution" in subdivision (3) of Rule 10(b)-6. The defendant argues that anyone who, whether by agreement or otherwise, purchases distribution stock is *ipso facto* participating in that distribution. It then argues that such a person is prohibited from purchasing free market stock until he has sold all of the distribution stock he purchased. The plaintiffs take a more restrictive view. They argue that "is participating" must be read in conjunction with the words which immediately precede it: "has agreed to participate." It is their view that no one actually participates in a distribution unless they have already agreed to participate. They maintain that participation cannot be foisted unwittingly on anyone and that the determination of when a person completed his participation can only be meaningfully measured by reference to the extent of his agreed-to participation.

There are certain well known principles of securities law which favor the reading suggested by the defendant. First is the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes. The Securities Exchange Act quite clearly fits into the category of remedial legislation." *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967). *See also Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F. 2d 228 (2d Cir. 1974); *International Controls Corp. v. Vesco*, 490 F. 2d 1334 (2d Cir.), *cert. denied*, 417 U. S. 932 (1974). Second, it is neither unusual nor unjust that persons are deemed to have done something or to have become something which they neither intended nor desired. *See, e. g.*, I L. Loss *Securities Regulation* 548-49 (1961). *Cf. Securities & Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F. 2d 833 (2d Cir. 1968) (*en banc*), *cert. denied*, 394 U. S. 976 (1969); *Securities & Exchange Commission v. Chinese Consolidated Benevolent Association, Inc.*, 120 F. 2d 738 (2d Cir. 1941).

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Furthermore, as has been noted earlier, the mere fact that a new interpretation imposes sanctions on business activity that was previously freely engaged in by members of the securities industry is not sufficient reason not to find illegality in that practice. *Chasins v. Smith, Barney & Co.*, 438 F. 2d 1167 (2d Cir. 1970). Finally, the statutory language is plainly in the alternative: "who has agreed to participate *or* is participating."[25] The court does not believe, as the plaintiffs have tried to argue, that this interpretation cannot be coordinated with Rule 10b-6(c)(3) which states that "[a] person shall be deemed to have completed his participation in a particular distribution as follows: . . . (iii) . . . when he has distributed his participation." It would not be unreasonable to hold that where a person whether by agreement or otherwise has begun his participation in a distribution he must cease all other market transactions until all of the distribution shares have been disposed of pursuant to 17 C. F. R. § 240.10b-6(c)(3)(iii).

The SEC in *Jaffee* seems also to have adopted the reading urged by the defendant:

> "G Co. [Greene], which engages mainly in trading securities for its own account, purchased as principal through Horn over 25,000 shares of registered Solitron stock from Lee for resale. With every such purchase of stock and until such shares were resold, G Co., which received copies of the Solitron prospectus from Lee and thus was aware that a distribution of registered Solitron stock was in progress, became a participant in the distribution and subject to the prohibitions in Rule 10b-6. *Jaffee, supra* at 83,858.

Nonetheless, this court is not inclined to accept so readily this interpretation.

First the SEC has at least misquoted, if not misread, Rule 10b-6 in reaching its decision in the *Jaffee* case. In deciding that Greene was a participant in the distribution, it read Rule 10b-6 to state that its prohibitions reach anyone who is participating directly or indirectly in a particular distribution. Then in reliance on the general rule that a "'[d]istribution' comprises 'the entire process by which in the course of a public offering the block of securities is dispersed and ultimately comes to rest in the hands of the investing public.'" *R. A. Holman & Co. v. Securities & Exchange Commission*, 366 F. 2d 446, 449 (2d Cir. 1966), it concluded that Greene was a participant in the distribution for purposes of Rule 10b-6. The problem is that the words "directly or indirectly" do not modify "is participating" as the SEC has quoted it in *Jaffee, supra* at 83,858. Rather, "directly or indirectly" modifies "bid for or purchase" which is separated from the words in question by several other modifiers. Weiss & Leibowitz, *Rule 10b-6 Revisited*, 39 Geo. Wash. L. Rev. 474, 84-85 (1971); Trading During a Distribution, 4 *Rev. of Sec. Reg.* 990, 991 (1971). Reference to the Federal Register also confirms this reading. Each of the three subdivisions of Rule 10b-6(a) is set off from the body of the rule. 20 Fed. Reg. 5075 (1955). When the rule was reprinted in C. F. R., the separation must have been omitted in error. Thus subdivision (3) runs into the body of the rule, and the casual reader is apt to mistake the words directly or indirectly as part of that section. But the context as well as the original enactment indicate that reading to be in error. This court does not accept therefore the defendant's contention that it ought to defer to the agency's interpretation since that interpretation is based at least in part on a misreading of the statute.[26]

The *Collins* case speaks in terms of whether or not the purchases and sales of registered stock constitute a distribution. But its discussion of the activities of Collins and his

[25] Emphasis added.

[26] It seems reasonable to conclude, on the basis of the *Collins* decision that the SEC itself believed the reading of Rule 10b-6 in *Jaffee* to be erroneous. Nonetheless, it submitted an *amicus* brief urging the court to grant summary judgment to the defendant. To avoid reaching the question of the validity of *Jaffee* itself or its direct applicability to the case at bar, the SEC adopted a strained reading of Section 19(a) of the Securities Act and Section 23(a) of the Securities Exchange Act to make those sections cover the defendant's potential liability in a breach of contract action. Furthermore, without so much as a hint of the decision to come, a footnote in that *amicus* brief at 27 said, "[t]he Commission presumably would have the authority to reinstate the prohibitions of Jaffee they [sic] express amendment of Rule 10b-6 or through the adoption of a new rule." This court has been informed that the *Collins* case was argued before the SEC on February 8, 1974 more than one year and three months before the filing of the *amicus* brief in this case. It is inconceivable that at the time that brief was filed the SEC sincerely believed in the validity of the *Jaffee* ruling. Both the theory of the brief and the timing of the *Collins* case support that view. This court expressly disapproves of the tactics engaged in by the SEC in this matter and feels it appropriate to so state on the record.

company and its determination that in fact Rule 10b-6 had been violated focuses primarily on the nature and extent of its own particular role rather than the nature of the offering in general. It is this court's conclusion that there is a two-step inquiry: first, was the sale of stock by the issuer a distribution and second, if so, did the activities of Faulkner constitute participation in that distribution.[27]

Thus, in *Collins*, the SEC suggests that were an exchange specialist or a market maker to acquire registered stock in the performance of its normal functions, it would be an unwarranted extension of Rule 10b-6 and would cause an unnecessary disruption of market activities to find that acquisition to be violative of Rule 10b-6, thus requiring the specialist or market maker to get out of the market until he had disposed of the registered shares. In this court's opinion, this conclusion rests not on a finding that the original sale of the registered shares was not a distribution for the purposes of Rule 10b-6, but rather on the conclusion that the activities of the market maker or specialist did not constitute participation in that distribution.

In the case at bar, Faulkner contracted with Tobey & Kirk, the underwriter for some of the selling shareholders, to purchase 44,000 shares of White Shield, an amount which constitutes about 10.4% of the shares being sold pursuant to Registration Statement No. 2-40398. However, it appears that the SEC in determining whether certain NASD members were acting as underwriters in the White Shield distribution, treated all the shares being sold under two registration statements, Nos. 2-40398 and 2-40397, which covered 1,272,513 shares, as one offering. Faulkner's participation in that distribution amounted to about 3.5% of the total. If all four registration statements are considered, Faulkner's participation drops to 1.04%. Furthermore, Faulkner itself acknowledges that its purchase of the White Shield stock was "for resale in the ordinary course of its business." Faulkner's Memorandum of Law in Support of its Motion for Summary Judgment at 105. Under the *Bruns, Nordeman* standard, Faulkner has not made a distribution of White Shield stock nor has it sufficiently participated in a distribution pursuant to *Collins*.

Both the SEC and the defendant argue that even if the court holds that the *Jaffee* case is invalid or inapplicable, Section 23(a) of the Securities Exchange Act, 15 U. S. C. § 78w(a) should provide protection to the defendant. Section 23(a) provides that:

> No provision of this chapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission . . . notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

Even accepting the extension of this section articulated in *Gerstle v. Gamble-Skogmo, Inc.*, 478 F. 2d 1281 (2d Cir. 1973), that it applies to the Commission's interpretations of its own Rule, this court cannot agree to a further extension to reach liability imposed by state contract law. Congress has worded this exemption narrowly and there is no indication it should be otherwise construed. It is therefore concluded that the Fourth Defense is insufficient as a matter of law.

Defendant's motion for summary judgment on its Fourth Affirmative Defense and its Second Counterclaim is denied. Plaintiffs' motion for summary judgment on defendant's Fourth Affirmative Defense and Second Counterclaim is hereby granted.

FIFTH AFFIRMATIVE DEFENSE

The defendant's Fifth Affirmative Defense is unique; Faulkner asserts the right to cancel the contract and rescind the purchase on the receipt of the prospectus. No authority has been cited for this proposition, and this court has been unable to find any. Acceptance of this defense would stretch the provisions of the act far beyond their intended scope.

The defendant argues that inherent in the prospectus delivery requirement is an implied right to rescind. Otherwise, so the argument goes, the purpose of the delivery requirement would be defeated. That reading flies in the face of the statute and ignores already far-reaching, remedial provisions.

Section 5(b)(2)[28] of the 1933 Act makes it unlawful for anyone to send a registered security through the mail "for the

[27] An alternate reading of the *Collins* decision would result in a slightly different formulation of the question: Did the activities of Faulkner constitute in themselves a distribution?

[28] 15 U. S. C. § 77e(b)(2).

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*Language "and Third" added by amendment.

purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus." It was clearly within the contemplation of the drafters of the statute that a purchaser might not see the prospectus covering the security he purchased until after the sale had been completed. Yet no provision of the statute either permits recission upon receipt of the prospectus or prevents the parties from binding themselves to the terms of a contract prior to that receipt.

Furthermore, Section 12 of the 1933 Act[29] explicitly provides for recission in two specific circumstances: where a person offers or sells securities (a) in violation of Section 5 of the Act or (b) through the use of a material misrepresentation. The defendant would have this section judicially amended to include a third situation, *i. e.*, where a person, in conformity with the statute delivers a final prospectus and the purchased securities simultaneously. This the court refuses to do.

In support of its position, the defendant states that without this implied right to rescind, "What function does the prospectus serve? . . . [T]he entire statutory scheme would be incongruous and would fail in its principal purpose."[30] The fallacies in this reasoning should be patently obvious. First, a reading of the defendant's Third Affirmative Defense should help remind it what function the delivery of a prospectus serves even where it is delivered simultaneously with the shares being purchased. Section 12 does not limit the right to rescind to a time prior to the delivery of the purchased shares. In *Diskin v. Lomasney & Co.*, 452 F. 2d 871 (2d Cir. 1971) the court granted recission pursuant to Section 12 even though the purchaser had the opportunity to read the prospectus before paying for the shares, had taken delivery and paid in full for the shares when tendered and had waited nine months before demanding recission. This case makes it clear that there is no requirement that the purchaser exercise whatever right to rescind he claims to have immediately upon reading the prospectus. Thus where the prospectus gives the purchaser notice that a sale has been effectuated through the use of material misstatements or where the purchaser, at a later date, discovers that the prospectus whenever delivered omits a material fact, an action for recission is available to him.

Also, the statute makes the time when the shares are delivered the last moment when the prospectus must be made available to the purchaser. If a written confirmation is sent earlier, a prospectus must accompany it. § 5(b)(1) of the Securities Act of 1933, 15 U. S. C. § 77e(b)(1). Furthermore, no purchaser is compelled by any provision of the Act to bind himself to the purchase of any stock until he has had the opportunity to examine a final prospectus.

Accordingly, the defendant's motion for summary judgment on its Fifth Affirmative Defense is hereby denied and the plaintiffs' motion with respect to this defense is granted.

SIXTH AFFIRMATIVE DEFENSE

The defendant has asserted as its Sixth Affirmative Defense the failure of the plaintiffs to retender the shares, demand acceptance of them by Faulkner, or sell them within a reasonable time. These failures by the plaintiffs are said to constitute acquiescence in the cancellation and waiver of any right of recovery.

The court agrees that a party to a contract must tender its performance before he can hold another in default. *Garfield v. Strain*, 320 F. 2d 116 (10th Cir. 1963). But there can be no question, and the court so finds, that Byrnes and Santangelo have met their burden with respect to demanding performance of the contract. The parties have stipulated that on or about June 15, subsequent to the rejection of the tendered stock by Faulkner, Marc Green, counsel for Faulkner, discussed the cancellation of the trade with Vincent Ross of Tobey & Kirk, and Melville Hicks and Peter Landau, both attorneys for Tobey & Kirk. During one of those conversations, Mr. Landau informed Mr. Green that he would instruct Tobey & Kirk to *redeliver* the stock; Mr. Green responded that the stock would be refused. Stipulation, paragraph 21.

The parties have also stipulated that on or about June 21, 1971 Mr. Green had a conversation with Ray Merritt, an attorney for Byrnes. Mr. Green again stated that Faulkner was not obligated to accept the

[29] *Id.* § 77*l*.

[30] Letter to the court from Jacobs Persinger & Parker, attorneys for Faulkner, dated December 2, 1975, at 4.

stock and that Faulkner would litigate the issue. Stipulation, paragraph 22. On or about the same date, it has also been stipulated that meetings were held with the two individual plaintiffs, Vincent Ross of Tobey & Kirk and several representatives of Faulkner at which Faulkner explained why it had cancelled the trade. Stipulation, paragraph 23. It has been agreed that the last communication between Faulkner and either the plaintiffs or Tobey & Kirk occurred on June 23, 1971 when Mr. Green confirmed to Ross that Faulkner would not accept the stock. Stipulation, paragraph 24.

Under these circumstances there is no question of acquiescence. If any delay occurred after this time, it would relate to the question of the proper measure of damages, if any. It cannot be argued, however, that by failure to sell out immediately after June 23, 1971, the plaintiffs were acknowledging an acceptance of Faulkner's refusal to consummate the transaction. Plaintiff's motion for summary judgment, dismissing Faulkner's Sixth Affirmative Defense, is granted.

SEVENTH and EIGHTH AFFIRMATIVE DEFENSES

Two of Faulkner's affirmative defenses relates solely to the measure of damages for which it would be liable were the contract upheld and Faulkner found to be in breach. It is not necessary to reach either of these issues in light of the court's decision on the Second Affirmative Defense. However, in light of the extraordinary circumstances of this case, the court believes it to be appropriate to comment briefly on these defenses.

The Seventh Affirmative Defense seeks to limit the damages recoverable on the ground that the plaintiffs failed to mitigate their damages. According to Faulkner, the plaintiffs, having failed to resell the stock within a reasonable time are limited to the difference between the contract price and the market price on settlement date. The plaintiffs argue that their conduct was reasonable and that they should therefore recover their full damages—the difference between the contract price and the price at which the shares in question were actually sold. This court finds that the reasonableness of the plaintiffs' conduct is a question of fact which cannot be determined in a motion for summary judgment.

For its Eighth Affirmative Defense, the defendant invokes Regulation T of the Board of Governors of the Federal Reserve System which regulates the extension of credit between broker dealers and their customers. Faulkner argues that by failing to liquidate its account promptly, Tobey & Kirk violated the Regulation and the damages are consequently limited to the difference between the contract price and the market price five days after settlement date.

The purpose of Regulation T was to avoid excessive speculation in the securities market and "to prevent speculation on credit from draining a disproportionate share of the nation's credit resources into the stock market." *Naftalin & Co. v. Merrill Lynch, Pierce, Fenner & Smith*, 469 F. 2d 1166, 80 (8th Cir. 1972). In order to effectuate this purpose, the statute prohibits a creditor, statutorily defined as a broker or a dealer, from extending, arranging or maintaining any credit for a customer except as is expressly permitted by its terms. 12 C. F. R. § 220.

The defendant argues that *Naftalin & Co., supra*, stands for the proposition that Faulkner's status as a market maker does not prevent it from being considered a customer and that Tobey and Kirk clearly fits within the definition of creditor. The plaintiffs argue that they, not Tobey and Kirk, were the creditors and that Regulation T does not reach credit extended by private individuals if, in fact, any credit was extended under the circumstances of this case.

While the court does not dispute the fact that Tobey and Kirk fits within the definition of creditor and that Faulkner can be considered a customer, that reading of the statute ignores the fact that no violation has occurred unless credit is improperly extended. This is not a case like *Pearlstein v. Scudder & German*, 429 F. 2d 1136 (2d Cir. 1970), *on remand*, 346 F. Supp. 443 (S.D.N.Y. 1972), *reversed on other grounds*, Civ. No. 72-1984 (2d Cir., Dec. 24, 1975), in which the defendant broker dealer arranged a loan for the plaintiff who wished to purchase securities, bought these securities for the customer and then transferred them to the lending institution when the plaintiff failed to make the requisite payments. In that case the customer owed the purchase price to the broker dealer who failed to conduct the sell out as required by Regulation T. Here it is the plaintiffs to whom Faulkner allegedly owes the purchase price of the shares. If there has been any extension of credit, it was done by the plaintiffs themselves and not

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by their broker dealer. Accordingly, this court finds no violation of Regulation T.

NINTH AFFIRMATIVE DEFENSE

The defendant's Ninth Affirmative Defense is based on Tobey & Kirk's alleged failure to follow the NASD Uniform Practice Code in conducting the sell out of the rejected White Shield stock. The court rejects this defense on two grounds.

First, the Uniform Practice Code relates specifically to transactions between members. §1(a). The plaintiffs who are suing to recover the purchase price of the rejected stock are not bound by the NASD Rules and their rights do not depend on Tobey & Kirk effectuating the transaction in accordance with NASD procedures.

Second, §1(b) of the Uniform Practice Code provides that "failure to deliver the securities sold, or failure to pay for securities as delivered, on or after the settlement date, does not effect a cancellation of the contract. The remedy for the buyer or seller is provided for by Sections 59 and 60 respectively." The court does not accept the view that where the remedial sections are not followed, the contracts are thereby cancelled. The sections were written specifically to protect the party whose contract has been breached; this court can find no basis for implying a more drastic remedy where the injured party itself has failed to pursue the remedy provided. Furthermore, sections 59 and 60 are permissive and do not require that the injured party pursue the specific remedy detailed in them. The defendant's motion for summary judgment on its Ninth Affirmative Defense is hereby denied; the plaintiffs' motion to dismiss that defense is granted.

Except with respect to defendant's Second Affirmative Defense, Faulkner's motion for summary judgment on its First Counterclaim is in all other respects denied. Plaintiffs' motion for summary judgment on their claim for declaratory relief and to dismiss defendant's First Affirmative Defense is denied.

SO ORDERED.

Amendment to Opinion # 43960, Dismissing all Claims

CAPTION OMITTED

AMENDMENT TO OPINION
Filed Apr. 13, 1976

HENRY F. WERKER, D. J.

I have read the briefs submitted in connection with the motions for reargument and certification and except as specified below I was not persuaded that my Opinion, dated February 26, 1976, should be changed in any fashion:

Page 3, last paragraph, first sentence should read: "The parties seem to agree, as does the court, that failure to disclose the fact that stock is, in fact, registered stock is a material omission."

Page 10, line 2 should read: February 25, 1959,

Page 16, line 5 which now reads "assert that § 12(b)" should be corrected to read "assert that § 12(2)".

Page 18, line 13 which now reads "write 512(b)" should be

corrected to read "write §12(2)".

Page 15, line 15 which now reads "under § 12(a)." should be corrected to read "write §12(1)."

Page 19, line 1 which now reads "that § 12(b)" should be corrected to read "that §12(2)".

Page 19, line 10 which now reads "12(a) or (b)" should be corrected to read "12(1) or (2)".

Page 4, third paragraph, line 3: delete "and Third Counterclaim."

Page 30, first paragraph, line 3 which now reads "Fourth Affirmative Defense and Second Counterclaim is" should be corrected to read "Fourth Affirmative Defense and Second and Third Counterclaims is".

Submit order on notice.

New York, New York
April 8, 1976

Henry F. Werker
U. S. D. J.

Thomas J. BYRNES and Francis R. Santangelo, Plaintiffs,

v.

FAULKNER, DAWKINS & SULLIVAN and Singer & Mackie, Inc., Defendants.

FAULKNER, DAWKINS & SULLIVAN, Counterclaim-Plaintiff,

v.

Thomas J. BYRNES et al., Counterclaim-Defendants.

No. 73 Civ. 670.

United States District Court, S. D. New York.

June 19, 1973.

Sellers of shares of corporate stock brought an action in state court to recover damages for the buyers' alleged breach of the purchase contract, and the buyers raised as defenses the sellers' alleged breaches of the Securities and Securities Exchange Acts. The sellers thereupon instituted in federal court a declaratory judgment action seeking a ruling that the buyers' defenses in the state court action were without merit, and the buyers counterclaimed for damages allegedly due because of the buyers' breaches of the same Acts. The District Court for the Southern District of New York, Gurfein, J., held that no federal jurisdiction existed as to the complaint for declaratory judgment, but that subject matter jurisdiction did lay as to defendants' counterclaim, and plaintiffs might properly assert the grounds for recovery alleged in their complaint as part of their answer and counterclaim to defendants' counterclaim.

Complaint dismissed with leave to plaintiffs to file further pleadings.

1. Courts ⇐280(1)

Even though defendants admitted plaintiffs' allegations of federal jurisdiction, court was required to determine whether there was subject matter federal jurisdiction, since United States district court is court of limited jurisdiction. 28 U.S.C.A. § 1331.

2. Declaratory Judgment ⇐25

Federal Declaratory Judgments Act is merely procedural and confers no additional jurisdiction on federal courts. 28 U.S.C.A. §§ 2201, 2202; Fed.Rules Civ.Proc. rule 57, 28 U.S.C.A.

3. Courts ⇐284(1)

Claims or defenses raised by defendants, although they may be based on federal statute, cannot provide basis for federal jurisdiction. 28 U.S.C.A. § 1331.

4. Courts ⇐489(1)

Even when federal jurisdiction is exclusive with respect to matters arising under particular federal statutes, questions involving such statutes may be decided by state court if cause of action itself has not arisen under such statutes.

5. Removal of Cases ⇐25(1)

Raising claim based on federal statute as matter of defense will not support removal.

6. Courts ⇐274

Federal court had no jurisdiction to entertain declaratory judgment action brought by sellers of stock to obtain ruling that defenses raised by buyers in state court action under provisions of Securities and Securities Exchange Acts were without merit. Securities Act of 1933, §§ 1 et seq., 17, 22, 22(a), 15 U.S.C.A. §§ 77a et seq., 77q, 77v, 77v(a); Securities Exchange Act of 1934, §§ 1 et seq., 10, 10(b), 27, 15 U.S.C.A. §§ 78a et seq., 78j, 78j(b), 78aa; 28 U.S.C.A. §§ 1331, 2201, 2202; Fed.Rules Civ.Proc.

rules 12(b)(6), (h), 13(h), 19(a), 20(b), 28 U.S.C.A.

7. Courts ⇐263(4)
Declaratory Judgment ⇐274

Even though federal court had no jurisdiction to entertain suit brought by sellers of stock to obtain declaratory judgment that defenses raised by buyers in state court action, involving provisions of Securities and Securities Exchange Acts, were not meritorious, court did have jurisdiction to entertain counterclaim by buyers alleging breach by sellers of provisions of those Acts, such counterclaim being a compulsory counterclaim, and sellers would be allowed to file answer to buyers' counterclaim and their own counterclaim against buyers seeking same relief as that prayed in original complaint. Securities Exchange Act of 1933, §§ 1 et seq., 17, 22, 22(a), 15 U.S.C.A. §§ 77a et seq., 77q, 77v, 77v(a); Securities Exchange Act of 1934, §§ 1 et seq., 10, 10(b), 27, 15 U.S.C.A. §§ 78a et seq., 78j, 78j(b), 78aa; 28 U.S.C.A. §§ 1331, 2201, 2202; Fed. Rules Civ.Proc. rules 12(b)(6), (h), 13(h), 19(a), 20(b), 28 U.S.C.A.

Carro, Spanbock & Londin, New York City, for plaintiffs.

Jacobs, Persinger & Parker, New York City, for defendant Faulkner, Dawkins & Sullivan.

Borden & Ball, New York City, for defendant Singer & Mackie, Inc.

Lawler, Sterling & Kent, New York City, for counterclaim-defendant Tobey & Kirk.

GURFEIN, District Judge.

THE STATE COURT ACTION

An action was begun in the Supreme Court, New York County by the plaintiffs, Byrnes and Santangelo ("Byrnes") against the defendants Faulkner, Dawkins & Sullivan ("Faulkner") for breach of contract. That complaint alleged that on June 7, 1971, the plaintiffs, through their broker, Tobey & Kirk ("Tobey"), sold, pursuant to a registration statement and prospectus, 44,000 shares of the common stock of White Shield Corporation ("White Shield") to Faulkner at a price of $14 per share, and 1,500 shares to Singer & Mackie, Inc. ("Singer") at 13¼ and 13⅛ per share. It alleged that "without just cause or excuse" each defendant purported to cancel the transaction in breach of its contract and that the plaintiffs were compelled to sell the rejected shares at a loss aggregating $219,180.79 against Faulkner and $5,964.51 against Singer.

The defendants, denying that their refusal to accept the shares tendered was "without just cause or excuse," interposed nine affirmative defenses, of which six related to claimed violations by plaintiffs or their broker Tobey of various provisions of the Securities Act of 1933 (15 U.S.C. § 77a et seq.) and the Securities and Exchange Act of 1934 (15 U.S.C. § 78a et seq.). *No counterclaim was interposed in the State Court action.*

THE FEDERAL ACTION

The plaintiffs, being unwilling to have *the affirmative defenses* based on alleged violations of the federal securities laws passed on by the State Court, brought this action for a declaratory judgment, and to recover the same amounts they had alleged in their State Court complaint (28 U.S.C. §§ 2201, 2202; Fed.R.Civ.P. 57).

The declaratory relief sought is a judgment declaring that each of the affirmative defenses asserted by the defendants in the State action is insufficient in law.

In its answer, the defendant Faulkner realleged the affirmative defenses that had been interposed in the State action, and, in addition, interposed three counterclaims. Faulkner also joins Tobey as a counterclaim-defendant. In its amended answer, the defendant Singer withdrew the counterclaims it had interposed in its original answer.

THE COUNTERCLAIMS

The first counterclaim alleges that Faulkner is entitled to a declaratory judgment that the affirmative defenses set forth in the answer of Faulkner in the State action are valid and sufficient in law and preclude plaintiffs from any right of recovery in the State action or herein.

The second counterclaim alleges that the counterclaim-defendants engaged in a plan to sell White Shield common stock owned by the plaintiffs and others in a distribution to Faulkner and other broker-dealers making a market in that common stock in violation of the rules and regulations of the Securities and Exchange Commission ("SEC") (presumably Rule 10b-6); that without knowledge of the plan or that the White Shield stock owned by the plaintiffs was being sold in a registered distribution, Faulkner on June 7, 1971 agreed to purchase from Tobey the 44,000 shares at $14 per share; that shortly thereafter, Faulkner sold 20,000 of the shares at an average price of $14⅛ per share; that on June 15, 1971, when Faulkner discovered that the stock which it had agreed to purchase was part of a registered distribution, it cancelled the agreement and was forced to cancel its own sale of 20,000 shares which had shown a profit of $1,875.00.

The third counterclaim charges that the counterclaim-defendants violated Section 17 of the 1933 Act, § 10(b) of the 1934 Act and Rule 10b-5 thereunder, § 352-c of the New York General Business Law, and the rights of purchasers at common law in that they represented that the stock being sold was not part of a registered distribution; that they failed to disclose that they were effecting an illegal distribution by selling large blocks of the stock to broker-dealers making a market therein; that they failed to disclose that Tobey was acting as an underwriter in connection with the distribution; that the confirmation delivered to Faulkner constituted a "prospectus" which did not meet the requirements of § 10 of the 1933 Act; and that the confirmation was not marked "prospectus enclosed" or "registered," nor was there any indication that the shares to be delivered were part of a registered distribution.

On these two counterclaims Faulkner seeks a judgment of $1,875 for compensatory damages, plus interest from June 15, 1971, and $1,000,000 as punitive damages. It also seeks the costs and disbursements of this action, including reasonable attorneys' fees.

THE MOTIONS

The plaintiffs now move (a) to dismiss the second and third counterclaims, pursuant to Fed.R.Civ.P. 12(b) and 56, for failure to state a claim upon which relief can be granted or for summary judgment; (b) in the alternative, pursuant to Fed.R.Civ.P. 12(b)(6) and 12(h) to dismiss for failure to state a claim or to strike as immaterial so much of the second and third counterclaims as seek recovery of punitive damages; (c) pursuant to Rules 13(h), 19(a) and 20(b) to dismiss the counterclaim against Tobey because it was joined as a party to the counterclaim without leave of Court and is not needed as a party for a just adjudication. Before considering the motions we must look to subject matter jurisdiction.

I

FEDERAL JURISDICTION

The effect of a declaratory judgment by this Court would be effectively to oust the State Court of its jurisdiction by virtue of res judicata or collateral estoppel if the federal action were tried first.

[1] Both Byrnes and Faulkner appear to be satisfied to have the controversy decided in the Federal Court. In fact, the defendant Faulkner admits the allegations of federal jurisdiction in the complaint.[1] The Court must, nonethe-

1. The defendant Singer in its amended answer, on the other hand, denies information sufficient to form a belief as to the truth of the jurisdictional allegation, al-

less, determine whether there is subject matter federal jurisdiction, for the United States District Court is a court of limited jurisdiction. Mansfield, Coldwater & Lake Michigan Ry. v. Swan, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884).

There is no allegation of diversity of citizenship. The plaintiff asserts that the Court has jurisdiction of the subject matter by virtue of Section 22 of the Securities Act of 1933, 15 U.S.C. § 77v; Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa; and the Declaratory Judgments Act, 28 U.S.C. § 2201 and § 2202; and upon principles of pendent jurisdiction.

[2–4] The Declaratory Judgments Act is merely procedural and confers no additional jurisdiction on the federal courts. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950). In the case at bar, the action "arises" under the State law governing contracts. Whatever claim the *defendant* may assert is not the "basis of the suit." Gully v. First National Bank in Meridan, 299 U.S. 109, 115, 57 S.Ct. 96, 81 L.Ed. 70 (1936). If the defendants had sought to remove the State Court case to the Federal Court they would not have succeeded. Thus, even when federal jurisdiction is exclusive with respect to matters "arising" under particular statutes, like the patent laws, questions involving patents may be decided, nevertheless, by the State Court, if the cause of action itself has not arisen under the patent laws. See Becher v. Contoure Laboratories, Inc., 279 U.S. 388, 391, 49 S.Ct. 356, 73 L.Ed. 752 (1929); American Harley Corp. v. Irvin Industries, 27 N.Y.2d 168, 174, 315 N.Y.S.2d 129, 263 N.E.2d 552 (1970); and see Lear Inc. v. Adkins, 395 U.S. 653, 676, 89 S.Ct. 1902, 23 L.Ed.2d 610 (1969); State of New York v. Transeience Corp., 73 Civ. 1451 (S.D.N.Y. June 1, 1973). See also Hart & Wechsler, The Federal Courts and the Federal System, p. 763, n. 2 (1953).

[5] The circumstance that the *justification* by the defendant involves a construction of federal law is not material to a determination of under what law the suit is brought. American Well Works Co. v. Layne and Bowler Co., 241 U.S. 257, 260, 36 S.Ct. 585, 60 L.Ed. 987 (1916). Raising a claim based on a federal statute as a matter of defense will not support removal. Gully v. First National Bank, *supra*, 299 U.S. at 113, 57 S.Ct. 96.[2]

The bringing of the declaratory judgment action in this Court is an ingenious attempt to avoid the solid case law against removal in these circumstances. If there is *independent* federal jurisdiction, however, the bar to removal would be irrelevant, and jurisdiction, subject to considerations of comity, would be accepted.

[6] The only claims asserted by the plaintiff for the assumption of jurisdiction are Section 22 of the Securities Act and Section 27 of the Exchange Act.

Section 22(a) confers jurisdiction on the District Courts . . . "of all suits in equity and actions at law brought to enforce *any liability or duty created by this subchapter*" (15 U.S.C. § 77v(a); emphasis supplied). It further provides that "[n]o case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." *Id.*

The Congress intended to make jurisdiction even over suits brought to enforce liabilities "arising" under the Securities Act of 1933 concurrent in both the federal and state courts.

The affirmative defenses under the 1933 Act interposed in the State Court action would, under the Congressional

though no such denial appears in Singer's original answer.

2. As Professor Wechsler has suggested, "There is no need for the original jurisdiction when litigants rely on federal rights to furnish them a shield but not a sword." Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemporary Problems, 216, 234 (1948).

policy, be justiciable in the State Court. There is no reason of policy to thwart the Congressional intention by accepting jurisdiction in this action simply because removal as such is not sought and because the handle to federal jurisdiction is a declaratory judgment complaint instead.

Independent federal jurisdiction cannot be founded on Section 22 of the Securities Act because by no stretching of words can the state-created breach of contract claim by the plaintiff be an action to enforce a liability *created by the Securities Act*.

Section 27 of the 1934 Act provides that the District Courts shall have exclusive jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty *created* by this chapter or the rules and regulations thereunder." (15 U.S.C. § 78aa: emphasis supplied).

The state-created claim for breach of contract is not "brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." The defense of justification for the alleged breach of contract as something required by federal law does not change the nature of the *plaintiff's* claim.

It is not the plaintiff who is seeking relief for the alleged violation of Rule 10b–6 under Section 10 of the 1934 Act or of Section 17 of the 1933 Act. It is the defendant who is claiming it as a shield.[3]

If resort is had to 28 U.S.C. § 1331—the federal question jurisdiction statute—the reasoning is the same. The claim for relief simply does not "arise" under a federal statute.

It might be thought unfortunate that when all parties are willing to accept federal jurisdiction in an area where federal judges are presumably more experienced than state judges, such jurisdiction should be refused. But the jurisdiction of the federal courts is a matter for Congressional determination as interpreted by the Supreme Court of the United States, and is not subject to a jurisdictional largess by a particular judge.

There is, to be sure, a dearth of authority upon the use of the declaratory judgment procedure in this context. The guidelines seem so clear to me, however, that I must follow them until higher authority says otherwise. I must, therefore, go a step further than did the three-judge court in Tape Industries Association of America v. Younger, 316 F. Supp. 340, 348 (C.D.Cal.1970) when it said: "Although the case law is not entirely clear, a Declaratory Judgment suit based on an anticipated Federal defense is probably not a proper basis for federal jurisdiction." (citing cases)

If the question is deemed a close one it would be a disservice to the plaintiffs and to the counterclaim-plaintiff as well to try the action to its conclusion on a shaky and doubtful foundation of federal jurisdiction. The complaint must be dismissed for lack of federal jurisdiction over the subject matter.

II

THE COUNTERCLAIM AND FEDERAL JURISDICTION

[7] Even though the complaint is dismissed for lack of jurisdiction, the compulsory counterclaim of Faulkner re-

3. The Commission had ruled in Matters of Jaffee & Company, CCH Fed.Sec.L.Rep. ¶ 77,803 (1970), aff'd in part, Jaffee & Co. v. SEC, 446 F.2d 387 (2 Cir. 1971) that a market maker of an over-the-counter security may not participate in a distribution of that security. A "market-maker" is a broker-dealer who regularly purchases and sells the stock in which it makes a market as principal and regularly enters quotations therefor in the "pink sheets" or through NASDAQ. *Jaffee* held that it is a violation of Rule 10b–6 under the 1934 Act for a selling broker to sell stock included in a registration statement to a market-maker, or for a market-maker to participate in the distribution, because it would be creating a market price by its own purchases and quotations. The Commission in *Jaffee* also refused to exempt shares originally included in a "shelf" registration.

mains if there is an independent basis of jurisdiction for it. Isenberg v. Biddle, 75 U.S.App.D.C. 100, 125 F.2d 741, 743 (1941); Switzer Brothers, Inc. v. Chicago Cardboard Co., 252 F.2d 407, 410 (7 Cir. 1958); Spivak v. United States, 254 F.Supp. 517, 523 (S.D.N.Y. 1966); 3 Moore's Federal Jurisdiction § 13.15[1] n. 3, p. 379. In the case at bar, the counterclaim of Faulkner alleges claims for relief under Section 10 of the 1934 Act and Rule 10b-5 thereof as well as under Section 17 of the 1933 Act. These are clearly federal claims under Section 27 of the 1934 Act and Section 22 of the 1933 Act and are an independent basis for federal jurisdiction.

It is a *compulsory* counterclaim because it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" Fed.R.Civ.P. 13(a).[4]

Since the Faulkner counterclaim remains, therefore, we must consider whether the complaint of Byrnes if interposed as defense and counterclaim to Faulkner's counterclaim would support a basis for federal jurisdiction.

In Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631 (3 Cir. 1961) the complaint having been dismissed, the counterclaim, as here, remained because of independent federal jurisdiction. The plaintiff then, still without independent federal jurisdiction, interposed an answer together with the same claim for relief, as a counterclaim. The Court found that the former plaintiff's claim was now a compulsory counterclaim, and that, hence, there was ancillary jurisdiction to entertain it. In the case of a compulsory counterclaim no independent federal jurisdiction would be required. Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367 (1926).

Since the counterclaim stands as a complaint properly cognizable in the federal court, the present plaintiffs may interpose an answer to the counterclaim and assert their own counterclaim for ancillary relief, provided that their counterclaim is a proper compulsory counterclaim under Fed.R.Civ.P. 13(a).

There is no doubt that the claim for breach of contract "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(a). It is, accordingly, a compulsory counterclaim. And substantially the same considerations that determine whether a counterclaim is compulsory also decide whether the Court has ancillary jurisdiction to adjudicate it. See Great Lakes Rubber Corp., *supra*, 286 F.2d at 633. Byrnes' claim bears a "logical relationship" to Faulkner's claim. United Artists Corp. v. Masterpiece Productions, Inc., 221 F. 2d 213, 216 (2 Cir. 1955). It would be in the interest of judicial economy to have both claims adjudicated in the same forum. Jurisdiction over the Faulkner counterclaim is exclusively in the federal court insofar as it seeks affirmative relief under the 1934 Exchange Act (§ 27; 15 U.S.C. § 78aa).

I will, accordingly, dismiss the complaint for lack of federal subject matter jurisdiction and sustain the counterclaim as properly within the subject matter jurisdiction of the Court. The plaintiff is given leave to answer the counterclaim and to file its own counterclaim. I shall hold the motion to strike the second and third counterclaims and to dismiss Tobey as a party in abeyance until the case is again at issue. At that time Byrnes may move, without additional supporting papers or memoranda of law, for the same relief it now seeks. When the matter is in such posture I shall decide the present motion. Since the defendant Singer has interposed no counterclaim, there is no federal jurisdiction as to

4. I leave open the question whether the first counterclaim standing alone which seeks merely a federal declaratory judgment of the validity of federal defenses interposed in a state action, is sufficient basis for federal jurisdiction. The counterclaim as an entire pleading supports federal jurisdiction and the question posed by the first counterclaim needs no answer now.

Singer and the action will be dismissed as to it.

Perhaps a word of explanation should be given for the result reached by so circuitous a route. In my judgment it is not permissible for the District Court to fudge the question of federal jurisdiction. The use of the declaratory judgment procedure, as exemplified by this case, may not be allowed to pass *sub silentio*, for even though the precedents set by this Court are not high authority, rulings by silence have a way of becoming precedents. It is better, therefore, to choose the harder route. When one retraces his steps another day he is not as likely to stumble.

The complaint is dismissed with leave to follow the pleading route suggested in this opinion.

It is so ordered.

Opinion # 39631, amending Opinion # 39582

CAPTION OMITTED

GURFEIN, D. J.

The opinion dated June 19, 1973 is amended as follows:

P. 3, lines 14-17 are deleted and the following substituted: "In its answer, the defendant Faulkner realleged the affirmative defenses that had been interposed in the State action, and, in addition, interposed three counterclaims. Faulkner also joins Tobey as a counterclaim-defendant. In its amended answer, the defendant Singer withdrew the counterclaims it had interposed in its original answer."

P. 6, lines 9-11 are deleted and the following substituted: "Both Byrnes and Faulkner appear to be satisfied to have the controversy decided in the Federal Court. In fact, the defendant Faulkner admits the allegations of federal jurisdiction in the complaint."*

P. 13, 7 lines from the bottom - Insert the following: "the present motion. Since the defendant Singer has interposed no counterclaim, there is no federal jurisdiction as to Singer and the action will be dismissed as to it."

s/M. I. GURFEIN
U.S.D.J.

Dated: June 27, 1973

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* The defendant Singer in its amended answer, on the other hand, denies information sufficient to form a belief as to the truth of the jurisdictional allegation, although no such denial appears in Singer's original answer.

Opinion # 39696, Denying Reargument or Certification

CAPTION OMITTED

GURFEIN, D. J.

The Court finds that the delay in making the motion was excusable. The motion for reargument is denied. The motion for a certification pursuant to 28 U.S.C. § 1292(b) is denied.

It is so ordered.

s/ M. I. GURFEIN
U.S.D.J.

Dated: July 23, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

THOMAS J. BYRNES and FRANCIS R. SANTANGELO,

Plaintiffs,

-against-

FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC.,

Defendants.

----------X

Index No.
73 Civ. [illegible]

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs, by their attorneys, CARRO, SPANBOCK & LONDIN, complaining of defendants, state:

The Parties

1. Each of the plaintiffs is a citizen of the State of New York residing in the Southern District of New York.

2. Upon information and belief, each of the defendants is, and at all times relevant to this action was, a citizen of the State of New York, with its office or principal place of business within the Southern District of New York, and each of the defendants was at all such times a securities broker-dealer registered as such with the Securities and Exchange Commission ("SEC"); and a member of the National Association of Securities Dealers, Inc. ("N.A.S.D.").

(a) Defendant Faulkner, Dawkins & Sullivan ("Faulkner") was and is a New York partnership with its office for the conduct of business at 60 Broad Street, Borough of Manhattan, City, County and State of New York; and

(b) Defendant Singer & Mackie, Inc. ("Singer") was and is a corporation existing under and by virtue of laws of the State of New York, with its principal place of business at 40 Exchange Place, Borough of Manhattan, City, County and State of New York.

Jurisdiction and Venue

3. This Court has jurisdiction of the subject matter of this action by virtue of section 22 of the Securities Act of 1933 ("the Securities Act" or "the 1933 Act"), 15 U.S.C. § 77v; section 27 of the Securities Exchange Act of 1934 ("the Exchange Act" or "the 1934 Act"), 15 U.S.C. § 78aa; and the Declaratory Judgments Act, 28 U.S.C. §§ 2201 and 2202; and upon principles of pendent jurisdiction.

4. The acts or transactions allegedly constituting violations of the Securities Act and the Exchange Act occurred within the Southern District of New York, and involved the use of the means and instrumentalities of transportation or communication in interstate commerce and of the mails.

The Need for Declaratory Relief

5. There exists an actual controversy within the subject matter jurisdiction of this Court, (not involving federal taxes), between plaintiffs and each of the defendants, involving the construction and application to the contract between plaintiffs and each of the defendants of various provisions of the Securities Act and the Exchange Act. The dispute involves an assertion, in substance, that contracts for the sale of securities by plaintiffs to each of the defendants are void and unenforceable by virtue of section 29 of the Exchange Act, 15 U.S.C. § 78cc, and section 14 of the Securities Act, 15 U.S.C. § 77n, because of alleged violations by plaintiffs or their broker, Tobey & Kirk, of various provisions of the two acts. Pursuant to section 27 of the Exchange Act, 15 U.S.C. § 78aa, this Court has exclusive plenary jurisdiction of claimed violations of the Exchange Act; and under section 22 of the Securities Act, 15 U.S.C. § 77v, of offenses and violations of the Securities Act. The nature of the alleged violations of the Securities Acts which defendants claim were committed by plaintiffs involves policy considerations which make it inappropriate that the state courts pass on the claimed violations.

Paragraph 6 Omitted

7. On or about July 7, 1972, plaintiffs commenced an action in the Supreme Court of the State of New York, County of New York, for breach of contract, ("the Santangelo action" or "the state action"), claiming aggregate damages from defendant Faulkner in the amount of $219,180.79 with interest; and from defendant Singer in the amount of $5,964.51 with interest. A copy of the complaint in the state action is annexed hereto and incorporated herein by reference as Exhibit "A".

8. On or about September 14, 1972, Faulkner served its Answer in the state action, a copy of which is annexed hereto and incorporated herein by reference as Exhibit "B". The Answer of defendant Faulkner admitted the essential facts of the contract of sale between it and plaintiffs, and of its purported cancellation of the trade, and asserted nine affirmative defenses, all but the sixth, seventh and ninth of which relate wholly to claimed violations by plaintiffs or their broker, Tobey & Kirk, of various provisions of the Securities Act and the Exchange Act, as follows:

(a) The first affirmative defense alleges that defendant Faulkner was a "market maker" in the stock of White Shield, and that the rules and regulations of the SEC prohibit a market maker from participating in a distribution of such a security. The first defense alleges that plaintiffs affirmatively misrepresented to Faulkner that the shares which they had

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contracted to sell to defendant Faulkner were not part of a registered distribution, and that such alleged misrepresentation violated section 17 of the Securities Act, section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, 15 U.S.C. § 77q, 15 U.S.C. § 78j(b), and 17 C.F.R. § 240.10b-5, so that plaintiffs may not recover against said defendant. Plaintiffs deny making any such misrepresentation, and affirmatively allege that defendant Faulkner knew that plaintiffs' shares were in distribution, and that plaintiffs had declined to offer the shares for sale until after the registration statement with respect thereto had become effective, despite repeated requests from representatives of defendant Faulkner.

(b) The second affirmative defense alleges that the "confirmation", i.e., the comparison, sent to defendant Faulkner by plaintiffs' broker, Tobey & Kirk, constituted a "prospectus" within the meaning of section 2(10) of the Securities Act, 15 U.S.C. § 77b(10), and that such putative "prospectus" did not comply with the requirement of section 10 of the 1933 Act, 15 U.S.C. § 77j, so that the sale of stock was in violation of section 5 thereof, 15 U.S.C. § 77e, with the result that plaintiffs may not recover from said defendant.

(c) The third affirmative defense alleges that plaintiffs' broker was a statutory underwriter, within the meaning of section 2(11) of the Securities Act, 15 U.S.C. § 77b(11), that

the prospectus of White Shield failed to disclose that fact in alleged violation of sections 7 and 10 of the 1933 Act, 15 U.S.C. §§ 77g and 77j, with the result that plaintiffs may not recover from said defendant.

(d) The fourth affirmative defense alleges that plaintiffs and their broker, Tobey & Kirk, sold shares of White Shield which were in distribution to brokers other than defendant Faulkner, who were making a market in such stock, in alleged violation of section 10(b) of the Exchange Act and Rules 10b-5 and 10b-6 thereunder, 15 U.S.C. § 78j(b), 17 C.F.R. §§ 240.10b-5, 240.10b-6, as a result of which plaintiffs may not recover from said defendant.

(e) The fifth affirmative defense alleges that, as a purchaser of a security in a registered distribution, defendant Faulkner became entitled to rescind the transaction upon receipt of a prospectus, which it did not receive prior to June 14, 1971, at which time it purported to rescind. Presumably said defendant is here invoking alleged rights under the Securities Act.

(f) The eighth affirmative defense alleges that if plaintiffs' broker, Tobey & Kirk, did not accept the cancellation of the transaction by defendant Faulkner on June 14, 1971, its failure to liquidate the transaction promptly constituted an unlawful extension of credit by Tobey & Kirk to Faulkner, in

violation of Regulation T promulgated by the Board of Governors of the Federal Reserve System pursuant to section 7 of the Exchange Act, 15 U.S.C. § 78g, by reason of which plaintiffs are not entitled to recover from said defendant.

(g) The sixth, seventh and ninth affirmative defenses do not expressly invoke the provisions of the Securities Act or the Exchange Act, but rather complain of the alleged lack of a formal demand and the alleged failure to reoffer the securities in time, in alleged violation of the rules of the National Association of Securities Dealers, Inc., thereby allegedly creating estoppel, failure to mitigate damages and waiver, which are claimed to deprive plaintiffs of the right to recover from said defendant.

9. On or about September 21, 1972, defendant Singer served its Answer in the state action, a copy of which is annexed hereto and incorporated herein by reference as Exhibit "C". Said defendant asserted essentially the same nine affirmative defenses as defendant Faulkner, virtually in haec verba. Plaintiffs incorporate herein by reference their characterization of these defenses, as contained in sub-paragraphs (a) through (g) of paragraph 8 hereof.

10. Although the defendants do not in terms seek affirmative relief in the state action, their denial of liability

because of alleged violations by plaintiffs of provisions of the Exchange Act and the Securities Act in substance asserts rights under section 29 of the Exchange Act, 15 U.S.C. § 78cc, and section 14 of the Securities Act, 15 U.S.C. § 77n.

(a) Defendants' first, fourth and eighth affirmative defenses claim wholly or in part violations of various provisions of the Exchange Act, of which this Court has exclusive plenary jurisdiction under section 27 thereof, 15 U.S.C. § 78aa.

(b) Defendants' first, second, third and fifth (semble) affirmative defenses claim wholly or in part violations of various provisions of the Securities Act, of which this Court has plenary concurrent jurisdiction under section 22 thereof, 15 U.S.C. § 77v.

(c) Defendants' sixth, seventh and ninth affirmative defenses arise out of and involve questions intimately related to the transactions of which this Court has jurisdiction under the 1933 and 1934 Acts, and this Court has pendent jurisdiction of the sixth, seventh and ninth counts.

AS AND FOR A FIRST COUNT

Paragraphs 11 through 18 Omitted

19. Plaintiffs pray for a judgment declaring that the first affirmative defense asserted by each of the defendants in the state action is insufficient in law because:

(a) At or prior to their respective purchases, each of the defendants in fact knew that the stock of White Shield sold by plaintiffs was being sold pursuant to a registration statement, and a market maker is not, as such, prohibited from purchasing registered stock from a person not in a control relationship with the issuer.

(b) Even if a market maker is prohibited from purchasing registered shares of stock while it is making a market in such stock, it is free to discontinue its market-making operations and to consummate the purchases for which it has contracted.

(c) Even if a market maker is prohibited from purchasing registered shares of a stock while it is making a market in such stock, such prohibition is personal to it as a market maker, and imposed no duty of inquiry or any disability on plaintiffs, as sellers of a security pursuant to an effective registration statement and prospectus.

(d) Even if plaintiffs could not compel specific performance of defendants' contracts to purchase such shares, defendants' asserted inability to consummate the transaction does not relieve them from liability to pay plaintiffs damages occasioned by reason of defendants' inability or refusal to accept delivery of the stock.

(e) With respect to defendant Singer, the first affirmative defense is inapplicable for the additional reason that it was not itself a purchaser of plaintiffs' stock, but rather, on information and belief, was agent for a purchaser not subject to the alleged disability claimed by Singer.

(f) Defendants' alleged common law rights were not violated by the sale to them of registered stock.

AS AND FOR A SECOND COUNT

Paragraphs 20 through 24 Omitted

25. Plaintiffs pray for a judgment declaring that the second affirmative defense asserted by each defendant in the state action is insufficient in law because:

(a) In the circumstances aforesaid, the comparisons exchanged by Tobey & Kirk with each of the defendants were not "prospectuses" within the meaning of section 2(10) of the Securities Act, 15 U.S.C. § 77b(10); and

(b) Plaintiffs, through their broker, Tobey & Kirk, fully complied with the requirements of sections 5(b) and 10(a) of the Securities Act, 15 U.S.C. §§ 77e(b), 77j(a), by furnishing each of the defendants with a formal prospectus covering shares of White Shield sold by plaintiffs, at the time Tobey & Kirk exchanged comparisons with each of the defendants; or advised said defendants where such a prospectus could be obtained; and by tendering sufficient copies of such prospectus at the time Tobey & Kirk attempted to deliver stock of White Shield to said defendants; and

(c) Defendants' failure and refusal to accept delivery of shares of common stock of White Shield owned by plaintiffs estops them to complain of their alleged non-receipt of prospectuses applicable to such shares.

AS AND FOR A THIRD COUNT

Paragraphs 26 through 30 Omitted

31. Plaintiffs pray for a judgment declaring that the third affirmative defense asserted by each defendant in the state action is insufficient in law because:

(a) Tobey & Kirk was not in fact an "underwriter" within the meaning of section 2(11) of the Securities Act of 1933, because:

(i) It did not purchase stock from, or sell stock for an "issuer", as defined; and

(ii) If plaintiffs be deemed "underwriters" as defined in the Act, Tobey & Kirk did not receive more than the normal and customary commission for selling such stock.

(b) The post-effective "sticker" amendment to the registration statement and prospectus covering plaintiffs' shares of White Shield stock fully complied with the rules and regulations of the SEC, and was timely in the circumstances.

(c) The statements made in the prospectus actually furnished to defendants at the time the comparisons were exchanged, as aforesaid, were not misleading in the light of the circumstances in which they were made, and were not, in any event, material.

AS AND FOR A FOURTH COUNT

Paragraph 32 Omitted

33. Plaintiffs pray for judgment declaring that the fourth affirmative defense asserted by both defendants in the state action is insufficient in law both for the reasons set forth in subparagraphs (b) and (c) of paragraph 19 of this complaint, and also because defendants may not invoke putative violations of the Exchange Act or the rules and regulations thereunder by persons who may have purchased White Shield stock from plaintiffs, as a defense to plaintiffs' claims for damages.

AS AND FOR A FIFTH COUNT

Paragraph 34 Omitted

35. Plaintiffs pray for a judgment declaring that the fifth affirmative defense asserted by the defendants in the state action is insufficient in law because:

(a) As alleged "purchaser[s] of a security in a registered distribution [defendants did not become] obligated [or entitled] to rescind the transactions upon receipt of the prospectus with respect to such distribution," as alleged in paragraph thirty-second of defendant Faulkner's Answer in the state action, and in paragraph thirty-first of defendant Singer's Answer in the state action, for reasons heretofore set forth in paragraphs 19 and 33 of this complaint; and

(b) Defendant Singer, as agent for an undisclosed purchaser, was not itself a "purchaser", as alleged in paragraph thirty-first of its Answer in the state action, and has no right to rescind the purchase transaction.

AS AND FOR A SIXTH COUNT

Paragraphs 36 through 40 Omitted

41. Plaintiffs pray for a judgment declaring that the eighth affirmative defense asserted by the defendants in the state action is insufficient in law because:

(a) Regulation T has no application herein because it relates only to extension of credit by a broker-dealer or member of a national securities exchange to his customer, as used in the ordinary usage of the trade; and

(i) Neither plaintiff was functioning in the transaction in suit as a broker-dealer or member of a national securities exchange; and

(ii) Neither of the defendants was a "customer" of either of the plaintiffs or of Tobey & Kirk, as that term is used in the ordinary usage of the trade.

(b) The transactions between plaintiffs and defendants were at no time intended as credit transactions, and defendants at no time asked for or received credit from plaintiffs or Tobey & Kirk.

(c) The relationship of each of the defendants with Tobey & Kirk was that of broker-dealer with broker-dealer, and Tobey & Kirk's obligation to liquidate the trades, if any, was governed by the Emergency Rules of the National Association of Securities Dealers, Inc., which provided up to 120 days within which to liquidate the trade.

(d) Plaintiffs were not obliged by Regulation T or otherwise to dump their White Shield stock in circumstances in which defendants' own acts had made these shares unsaleable in an orderly manner.

AS AND FOR A SEVENTH COUNT

Paragraph 42 Omitted

43. Plaintiffs pray for a judgment declaring that the sixth, seventh and ninth affirmative defenses asserted by the defendants in the state action are insufficient in law because:

(a) The demands made by plaintiffs upon defendant Faulkner (and through defendant Faulkner upon defendant Singer) in the two months of negotiations, as aforesaid, were sufficient demands;

(b) Defendants are estopped by their own conduct and representations to complain of plaintiffs' failure or inability to sell their White Shield stock immediately after the said defendants' refusal to accept delivery thereof, or the manner in which plaintiffs allocated sales for the respective accounts of the two defendants;

(c) Defendants have sustained no damage by reason of plaintiffs' failure or inability to sell out their White Shield stock immediately after the said defendants' refusal to accept delivery thereof; and

(d) The manner in which plaintiffs sold out the shares of White Shield stock so sold, sufficiently complied with the rules of the National Association of Securities Dealers, Inc., and the principles of trade, and the sales transactions were sufficiently identified or identifiable.

WHEREFORE, plaintiffs pray for judgment as set forth in paragraphs of this complaint numbered 19, 25, 31, 33, 35, 41 and 43, and for such necessary or proper relief based upon said declaratory judgment or decree as to the Court may seem just and proper, including reasonable attorneys' fees and the costs and disbursements of this action.

CARRO, SPANBOCK & LONDIN

By _____
A Member of the Firm

Attorneys for Plaintiffs
10 East 40 Street
New York, New York 10016
Tel.: (212) 685-2700

Exhibits "A", "B" and "C" Omitted
(Pleadings in State Court Action)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS J. BYRNES and FRANCIS R. SANTANGELO,

Plaintiffs,

-against-

FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC.,

Defendants.

ANSWER AND COUNTERCLAIMS

73 Civ. 670 M.I.G.

FAULKNER, DAWKINS & SULLIVAN,

Counterclaim-Plaintiff,

-against-

THOMAS J. BYRNES, FRANCIS R. SANTANGELO and TOBEY & KIRK,

Counterclaim-Defendants.

Defendant Faulkner, Dawkins & Sullivan, by its attorneys, Jacobs Persinger & Parker, answering the complaint herein:

Paragraphs FIRST through FORTY-SEVENTH Omitted

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

FORTY-EIGHTH: Prior to the agreement of sale as set forth in paragraph "FOURTH" hereof, plaintiffs, by telephone, represented to Faulkner, Dawkins & Sullivan that the 44,000 shares of Common Stock of White Shield Corporation referred to in said paragraph "FOURTH" were not part of a registered distribution.

FORTY-NINTH: Faulkner, Dawkins & Sullivan agreed to purchase the said shares in reliance upon said representation.

FIFTIETH: Faulkner, Dawkins & Sullivan, as a registered broker-dealer, was at all times relevant hereto subject to the rules and regulations of the Securities and Exchange Commission.

FIFTY-FIRST: At all times relevant hereto, Faulkner, Dawkins & Sullivan acted as a market-maker of the Common Stock of White Shield Corporation.

FIFTY-SECOND: The rules and regulations of the Securities and Exchange Commission prohibit a market-maker of a security from participating in a distribution of that security, unless it cease acting as a market-maker for ten or more business days prior to such participation.

FIFTY-THIRD: The 44,000 shares of Common Stock sold by plaintiffs were in fact part of a registered distribution, and were accordingly rightfully rejected by Faulkner, Dawkins & Sullivan.

FIFTY-FOURTH: Plaintiffs' representation that such shares were not part of a registered distribution was false and fraudulent when made and constituted a violation of Section 17 of the Securities Act of 1933, as amended (15 U.S.C. § 77q(a)), Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 thereunder, Section 352-c of the New York General Business Law and Faulkner, Dawkins & Sullivan's rights under common law.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

FIFTY-FIFTH: On or about June 7, 1971, plaintiffs' agent, Tobey & Kirk, by mail, confirmed in writing to Faulkner, Dawkins & Sullivan the sale of the 44,000 shares referred to in paragraph "FOURTH" hereof.

FIFTY-SIXTH: The said written confirmation constitutes a "prospectus" as defined in the Securities Act of 1933, as amended.

FIFTY-SEVENTH: The said written confirmation was not accompanied by or preceded by a prospectus meeting the requirements of Section 10 of the said Act, and accordingly, the sale of the said 44,000 shares to Faulkner, Dawkins & Sullivan was made in violation of Section 5 of the said Act.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

FIFTY-EIGHTH: Upon information and belief, in or about June, 1971, plaintiffs' agent, Tobey & Kirk, participated in the distribution of Common Stock of White Shield Corporation being sold by plaintiffs and other selling shareholders, and was an underwriter as defined in Section 2 (11) of the Securities Act of 1933, and Rule 10b-6 under the Securities Exchange Act of 1934.

FIFTY-NINTH: The prospectus of White Shield Corporation in respect of such distribution did not disclose the participation of said Tobey & Kirk as an underwriter in the distribution, as required by Sections 7 and 10 of the Securities Act of 1933, as amended, and in order to make statements made in the said prospectus in the light of the circumstances under which they were made, not misleading, and accordingly, the sale, by telephone, of the said 44,000 shares to Faulkner, Dawkins & Sullivan was made in violation of the said Act.

SIXTIETH: Upon information and belief, Tobey & Kirk knew, prior to the effective date of the registration statement of White Shield Corporation containing the said June 7, 1971 prospectus, that it expected to participate in the distribution to the extent of more than 10% of the shares to be sold by the said prospectus.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

SIXTY-FIRST: Upon information and belief, plaintiffs and plaintiffs' agent, Tobey & Kirk, acting in concert, in or about June, 1971, solicited bids from and sold Common Stock of White Shield Corporation to various broker-dealers who were making a market in the Common Stock of White Shield Corporation, without disclosing that the stock to be delivered was part of a registered distribution.

SIXTY-SECOND: Upon information and belief, plaintiffs and their said agent knew or upon exercise of reasonable diligence should have known that Faulkner, Dawkins & Sullivan and others to whom plaintiffs and their said agent were soliciting bids for and selling Common Stock of White Shield Corporation in a distribution thereof were making a market in the Common Stock of White Shield Corporation, and accordingly, the conduct of plaintiffs and their said agent was in violation of Section 10 of the Securities Exchange Act of 1934 and Rule 10b-6 thereunder.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

SIXTY-THIRD: Faulkner, Dawkins & Sullivan, as a purchaser of a security in a registered distribution, became entitled to rescind the transaction upon receipt of the prospectus with respect to such distribution.

SIXTY-FOURTH: Faulkner, Dawkins & Sullivan did not receive a prospectus with respect to the distribution prior to June 15, 1971.

SIXTY-FIFTH: On June 15, 1971, Faulkner, Dawkins & Sullivan notified plaintiffs of the cancellation of the said transaction.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

SIXTY-SIXTH: Since June 15, 1971, the date on which Faulkner, Dawkins & Sullivan cancelled the said transaction as aforesaid, plaintiffs have never demanded that Faulkner, Dawkins & Sullivan accept delivery of the securities nor have they tendered to said defendant such securities for acceptance.

SIXTY-SEVENTH: Further, plaintiffs, after notice of cancellation of the said transaction by Faulkner, Dawkins & Sullivan on June 15, 1971, failed to re-offer the securities in the open market within a reasonable time.

SIXTY-EIGHTH: By reason of the foregoing, plaintiffs acquiesced in the said cancellation and have waived and are estopped from claiming any right to recovery from Faulkner, Dawkins & Sullivan.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

SIXTY-NINTH: Repeats and realleges the statements averred in paragraphs "SIXTY-SIXTH" and "SIXTY-SEVENTH" hereof as though set forth herein at length.

SEVENTIETH: By reason of the foregoing, plaintiffs have failed to take action to mitigate any alleged damages and have no right of recovery against Faulkner, Dawkins & Sullivan of the damages claimed by plaintiffs.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

SEVENTY-FIRST: If plaintiffs and plaintiffs' agent, Tobey & Kirk, did not accept the cancellation of the said transaction by Faulkner, Dawkins & Sullivan on June 15, 1971, then the failure to promptly liquidate the transaction

and sell out the said securities constituted a violation of Regulation T of the Board of Governors of the Federal Reserve System, so that plaintiffs have no right of recovery against Faulkner, Dawkins & Sullivan of any damages occasioned thereby.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

SEVENTY-SECOND: Any loss to plaintiffs on the sale of shares of White Shield Corporation is not attributable to Faulkner, Dawkins & Sullivan, by reason of the facts that such securities were not sold out in accordance with the rules of the National Association of Securities Dealers, Inc., nor identified to the June 7, 1971 agreement between plaintiffs' agent, Tobey & Kirk, and Faulkner, Dawkins & Sullivan.

AS AND FOR A FIRST COUNTERCLAIM

SEVENTY-THIRD: Repeats and realleges the statements averred in paragraphs "FIRST" through "SEVENTY-SECOND" hereof as though set forth herein at length.

SEVENTY-FOURTH: By reason of the foregoing, Faulkner, Dawkins & Sullivan is entitled to a declaratory judgment that the affirmative defenses set forth in the Answer of Faulkner, Dawkins & Sullivan in the state action are valid and sufficient in law and preclude plaintiffs from any right of recovery in the state action or herein against Faulkner, Dawkins & Sullivan.

AS AND FOR A SECOND COUNTERCLAIM

SEVENTY-FIFTH: Repeats and realleges the statements averred in paragraphs "FIRST" through "SEVENTY-SECOND" hereof as though set forth herein at length.

SEVENTY-SIXTH: Upon information and belief, counterclaim-defendant Tobey & Kirk was at all times relevant a securities broker-dealer registered as such with the Securities and Exchange Commission and a member firm of the National Association of Securities Dealers, Inc., and a partnership with its principal office at 52 Wall Street, New York, New York, and presently located at 77 Water Street, New York, New York.

SEVENTY-SEVENTH: This Court has jurisdiction of the counterclaims hereinafter set forth by virtue of Section 22 of the Securities Act of 1933 (15 U.S.C. § 77 v), Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. § 78 aa), and principles of pendent jurisdiction.

SEVENTY-EIGHTH: Upon information and belief, counterclaim-defendants, within the Southern District of New York, by the use of the means and instrumentalities of interstate commerce and of the mails, employed, in connection with the sale of Common Stock of White Shield Corporation to Faulkner, Dawkins & Sullivan and others, manipulative and deceptive devices in contravention of the rules and regulations of the Securities and Exchange Commission, and employed a device, scheme and artifice to defraud, made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in acts, practices or courses of business which operated as a fraud or deceit upon Faulkner, Dawkins & Sullivan and other purchasers of Common Stock of White Shield Corporation from counterclaim-defendants, in connection with the aforesaid sales of such Common Stock, as hereinbefore and hereafter set forth.

SEVENTY-NINTH: Upon information and belief, in or about June of 1971, counterclaim-defendants engaged in a plan to sell Common Stock of White Shield Corporation owned by plaintiffs and others in a distribution thereof to Faulkner, Dawkins & Sullivan and other broker-dealers making a market in said Common Stock in violation of the rules and regulations of the Securities and Exchange Commission.

EIGHTIETH: Without knowledge of counterclaim-defendants' unlawful plan as aforesaid, or the fact that the Common Stock owned by plaintiffs was being sold in a registered distribution, on or about June 7, 1971, Faulkner, Dawkins & Sullivan agreed to purchase from Tobey & Kirk an aggregate of 44,000 shares of Common Stock of White Shield Corporation at a purchase price of $14.00 per share.

EIGHTY-FIRST: Thereafter, and on or about June 7, 1971, Faulkner, Dawkins & Sullivan sold an aggregate of 20,000 of said shares at an average purchase price of $14-3/32 per share.

EIGHTY-SECOND: On or about June 15, 1971, when Faulkner, Dawkins & Sullivan discovered that the stock which it had agreed to purchase from Tobey & Kirk was part of a registered distribution, it cancelled the said agreement and accordingly, was forced to and did cancel its sale of the said 20,000 shares as aforesaid.

EIGHTY-THIRD: By reason thereof, Faulkner, Dawkins & Sullivan was damaged in the amount of $1,875.

AS AND FOR A THIRD COUNTERCLAIM

EIGHTY-FOURTH: Repeats and realleges the statements averred in paragraphs "FIRST" through "EIGHTY-THIRD" hereof as though set forth herein at length.

EIGHTY-FIFTH: In connection with the sale of Common Stock of White Shield Corporation to Faulkner, Dawkins & Sullivan and others, counterclaim-defendants made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, in violation of Section 17 of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, Section 352-c of the New York General Business Law, and the rights of the purchasers under common law, as follows:

(a) Counterclaim-defendants represented that the said Common Stock being sold was not part of a registered distribution;

(b) Counterclaim-defendants failed to disclose that they were effecting an illegal distribution by selling large blocks of the said Common Stock to broker-dealers making a market therein;

(c) Counterclaim-defendants failed to disclose that Tobey & Kirk was acting as an underwriter in connection with the aforesaid distribution.

EIGHTY-SIXTH: Further, in aid of said unlawful plan, Tobey & Kirk delivered a confirmation to Faulkner, Dawkins & Sullivan which constituted a "prospectus", which was not preceded by or accompanied by a prospectus meeting the requirements of Section 10 of the Securities Act of 1933.

EIGHTY-SEVENTH: Further, in aid of said unlawful plan, and concealing the fact that the shares being sold by counterclaim-defendants were part of a registered distribution, the said confirmation of Tobey & Kirk was not

marked "prospectus enclosed" or "registered", nor did it contain any other language in any way indicating that the shares to be delivered were part of a registered distribution.

EIGHTY-EIGHTH: By reason thereof, Faulkner, Dawkins & Sullivan sustained damages as set forth in paragraphs "EIGHTY-FIRST" through "EIGHTY-THIRD" hereof.

WHEREFORE, defendant and counterclaim-plaintiff Faulkner, Dawkins & Sullivan prays judgment as follows:

(a) Dismissing the complaint as against it;

(b) Awarding it a judgment as set forth in the First Counterclaim herein;

(c) With respect to the Second Counterclaim herein, awarding it a judgment against all counterclaim-defendants in the amount of $1,875 for compensatory damages, plus interest thereon from June 15, 1971, and $1,000,000 as punitive damages;

(d) With respect to the Third Counterclaim herein, awarding it a judgment against all counterclaim-defendants in the amount of $1,875 for compensatory damages, plus interest thereon from June 15, 1971, and $1,000,000 as punitive damages;

(e) Awarding it costs and disbursements of this action, including reasonable attorneys' fees; and

(f) Granting to it such other and further relief as the Court deems just and proper.

JACOBS PERSINGER & PARKER

By Edward B. Winslow
A Member of the Firm
Attorneys for Defendant
FAULKNER, DAWKINS & SULLIVAN
70 Pine Street
New York, New York 10005
Tel: (212) 344-1866

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

THOMAS J. BYRNES and FRANCIS R. SANTANGELO,

Plaintiffs,

- against -

FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC.,

Defendants.

----------X

FAULKNER, DAWKINS & SULLIVAN,

Counterclaim-Plaintiff,

- against -

THOMAS J. BYRNES, FRANCIS R. SANTANGELO and TOBEY & KIRK,

Counterclaim-Defendants.

----------X

SINGER & MACKIE, INC.,

Counterclaim-Plaintiff,

- against -

THOMAS J. BYRNES, FRANCIS R. SANTANGELO and TOBEY & KIRK,

Counterclaim-Defendants.

----------X

ANSWER AND COUNTERCLAIMS

73 Civ. 670 M.I.G.

Defendant, Singer & Mackie, Inc., by its attorneys, Borden & Ball, as and for its answer to the complaint herein:

Paragraphs FIRST through SIXTY-FOURTH Omitted

AS AND FOR A FIRST COUNTERCLAIM

SIXTY-FIFTH: Repeats and realleges the statements averred in paragraphs "FIRST" through "SIXTY-FOURTH" hereof as though set forth herein at length.

SIXTY-SIXTH: By reason of the foregoing, Singer & Mackie, Inc. is entitled to a declaratory judgment that the affirmative defenses set forth in the Answer of Singer & Mackie, Inc. in the state action are valid and sufficient in law and preclude plaintiffs from any right of recovery in the state action or herein against Singer & Mackie, Inc.

AS AND FOR A SECOND COUNTERCLAIM

SIXTY-SEVENTH: Repeats and realleges the statements averred in paragraphs "FIRST" through "SIXTY-FOURTH" hereof as though set forth herein at length.

SIXTY-EIGHTH: Upon information and belief, counterclaim-defendant Tobey & Kirk was at all times relevant a securities broker-dealer registered as such with the Securities and Exchange Commission and a member firm of the National Association of Securities Dealers, Inc., and a partnership with its principal office at 52 Wall Street, New York, New York, and

presently located at 77 Water Street, New York, New York.

SIXTY-NINTH: This Court has jurisdiction of the counterclaims hereinafter set forth by virtue of Section 22 of the Securities Act of 1933 (15 U.S.C. § 77 v), Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. § 78 aa), and principles of pendent jurisdiction.

SEVENTIETH: Upon information and belief, counterclaim-defendants, within the Southern District of New York, by the use of the means and instrumentalities of interstate commerce and of the mails, employed, in connection with the sale of Common Stock of White Shield Corporation to Singer & Mackie, Inc. and others, manipulative and deceptive devices in contravention of the rules and regulations of the Securities and Exchange Commission, and employed a device, scheme and artifice to defraud, made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in acts, practices or courses of business which operated as a fraud or deceit upon Singer & Mackie, Inc. and other purchasers of Common Stock of White Shield Corporation from counterclaim-defendants, in connection with the aforesaid sales of such Common Stock, as hereinbefore and hereafter set forth.

SEVENTY-FIRST: Upon information and belief, in or about June of 1971, counterclaim-defendants engaged in a plan to sell Common Stock of White Shield Corporation owned by plaintiffs and others in a distribution thereof to Singer &

Mackie, Inc. and other broker-dealers making a market in said Common Stock in violation of the rules and regulations of the Securities and Exchange Commission.

SEVENTY-SECOND: Without knowledge of counterclaim-defendants' unlawful plan as aforesaid, or the fact that the Common Stock owned by plaintiffs was being sold in a registered distribution, on or about June 8, 1971, Singer & Mackie, Inc. agreed to purchase, as agent, from Tobey & Kirk 800 shares of Common Stock of White Shield Corporation at a price of $13.25 per share, 200 shares of Common Stock of White Shield Corporation at a price of $13.375 per share and 500 shares of Common Stock of White Shield Corporation at a price of $13.125 per share.

SEVENTY-THIRD: Singer & Mackie, Inc., as agent, was entitled to an aggregate commission of $260.54 in connection with the aforesaid agreements of purchase.

SEVENTY-FOURTH: On or about June 16, 1971, when Singer & Mackie, Inc. discovered that the stock which it had agreed to purchase from Tobey & Kirk was part of a registered distribution, it rescinded the said agreement.

SEVENTY-FIFTH: By reason thereof, Singer & Mackie, Inc. was damaged in the amount of $260.54.

AS AND FOR A THIRD COUNTERCLAIM

SEVENTY-SIXTH: Repeats and realleges the statements averred in paragraphs "FIRST" through "SEVENTY-FIFTH" hereof as though set forth herein at length.

SEVENTY-SEVENTH: In connection with the sale of Common Stock of White Shield Corporation to Singer & Mackie, Inc. and others, counterclaim-defendants made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, in violation of Section 17 of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934. Rule 10b-5 thereunder, Section 352-c of the New York General Business Law, and the rights of the purchasers under common law, as follows:

(a) Counterclaim-defendants represented that the said Common Stock being sold was not part of a registered distribution;

(b) Counterclaim-defendants failed to disclose that they were effecting an illegal distribution by selling large blocks of the said Common Stock to broker-dealers making a market therein;

(c) Counterclaim-defendants failed to disclose that Tobey & Kirk was acting as an underwriter in connection with the aforesaid distribution.

SEVENTY-EIGHTH: Further, in aid of said unlawful plan, Tobey & Kirk delivered a confirmation to Singer & Mackie, Inc. which constituted a "prospectus", which was not preceded by or accompanied by a prospectus meeting the requirements of Section 10 of the Securities Act of 1933.

SEVENTY-NINTH: Further, in aid of said unlawful plan, and concealing the fact that the shares being sold by

counterclaim-defendants were part of a registered distribution, the said confirmation of Tobey & Kirk was not marked "prospectus enclosed" or "registered", nor did it contain any other language in any way indicating that the shares to be delivered were part of a registered distribution.

EIGHTIETH: By reason thereof, Singer & Mackie, Inc. sustained damages as set forth in paragraphs "SEVENTY-THIRD" through "SEVENTY-FIFTH" hereof.

WHEREFORE, defendant and counterclaim-plaintiff Singer & Mackie, Inc. prays for judgment as follows:

(a) Dismissing the complaint as against it;

(b) Awarding it a judgment as set forth in the First Counterclaim herein;

(c) With respect to the Second Counterclaim herein, awarding it a judgment against all counterclaim-defendants in the amount of $260.54 for compensatory damages, plus interest thereon from June 16, 1971, and $50,000 as punitive damages;

(d) With respect to the Third Counterclaim herein, awarding it a judgment against all counterclaim-defendants in the amount of $260.54 for compensatory damages, plus interest thereon from June 16, 1971, and $50,000 as punitive damages;

(e) Awarding it costs and disbursements of this action, including reasonable attorneys' fees; and

(f) Granting to it such other and further relief as the Court deems just and proper.

BORDEN & BALL

By _____
A Member of the Firm
Attorneys for Defendant and
Counterclaim-Plaintiff,
SINGER & MACKIE, INC.
345 Park Avenue
New York, New York 10022
Tel: (212) 980-3350

Plaintiffs' Reply to Faulkner's First Counterclaim

CAPTION OMITTED

Plaintiffs, by their attorneys, Carro, Spanbock & Londin, for their Reply to the First Counterclaim asserted by defendant Faulkner, Dawkins & Sullivan, state:

1. Plaintiffs make no response to paragraphs First through Forty-seventh of Faulkner's Answer and Counterclaim (which are incorporated by reference in paragraph Seventy-third thereof), because said paragraphs make no allegations of fact, but consist merely of denials, denials of knowledge or admissions.

2. Deny each and every allegation contained in paragraphs of Faulkner's Answer and Counterclaim numbered Forty-eighth, Forty-ninth, Fifty-second, Fifty-third, Fifty-fourth,

Fifty-sixth, Fifty-seventh, Fifty-eighth, Fifty-ninth, Sixty-first, Sixty-second, Sixty-third, Sixty-fourth, Sixty-fifth, Sixty-sixth, Sixty-seventh, Sixty-eighth, Sixty-ninth, Seventieth, Seventy-first, Seventy-second, Seventy-third and Seventy-fourth.

3. Replying to paragraph Fiftieth of Faulkner's Answer and Counterclaim, admit, on information and belief, that Faulkner was, at all times relevant to this action, a registered broker-dealer, and, as such, was subject to regulations of the Securities and Exchange Commission.

4. Replying to paragraph Fifty-first of Faulkner's Answer and Counterclaim, admit, on information and belief, that Faulkner's name appeared in the "Pink Sheets" of the National Quotation Bureau, Inc., as a "market maker" in the stock of White Shield Corporation, on the dates June 4, 7, 8, 9, 10, 11, 14, 18 and 22, 1971; deny that Faulkner's name appeared in the "Pink Sheets" as a "market maker" of White Shield Corporation on June 15, 1971 (the date on which Faulkner refused to accept delivery of plaintiffs' White Shield stock), on June 16, 1971, on June 21, 1971, or on any date commencing June 23, 1971 through July 31, 1971. Except as so admitted or denied, deny each and every allegation contained in paragraph Fifty-first of Faulkner's Answer and Counterclaim.

5. Make no reply to paragraph Fifty-second of Faulkner's Answer and Counterclaim because said paragraph calls for a conclusion of law.

6. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs Fifty-fifth and Sixtieth of Faulkner's Answer and Counterclaim.

AS AND FOR A FIRST DEFENSE TO FAULKNER'S FIRST COUNTERCLAIM

7. At no time relevant to this action were plaintiffs, or either of them, "controlling persons" of White Shield Corporation, as that term is defined in the Securities Act of 1933 or the regulations thereunder, and their sale of stock of White Shield beneficially owned by them did not constitute a "distribution" of such stock within the meaning of said Act or regulations.

AS AND FOR A SECOND DEFENSE TO FAULKNER'S FIRST COUNTERCLAIM

8. Repeat and incorporate herein by reference each and every allegation contained in paragraph 7 of this Reply.

9. On information and belief, the registration statement of which the prospectus in suit was a part, was issued by White Shield Corporation, and covered shares being sold by some twenty-three persons or entities other than plaintiffs.

10. On information and belief, prior to the effective date of the said registration statement, attorneys for White Shield Corporation advised plaintiffs and other selling shareholders whose shares were covered by said registration statement that, by agreement between White Shield Corporation or

its attorneys and the Securities and Exchange Commission, the prospectus would "from time to time, as necessary, be amended and/or supplemented to disclose the identity of any NASD broker dealer who participates in the distribution of more than 10% of the shares covered by the Registration Statement in which your shares are included," and requesting advice from the selling shareholders (including plaintiffs) of the identity of each broker-dealer through whom shares of White Shield Corporation had been sold.

11. Plaintiffs duly advised White Shield or its attorneys that they had utilized Tobey & Kirk as their broker in connection with the sale of their shares of White Shield Corporation, and, by supplement dated June 18, 1971, to the prospectus dated June 7, 1971 ("the sticker amendment"), White Shield Corporation disclosed that:

> "By virtue of its acting as broker on behalf of Messrs. Thomas J. Byrnes, Vincent Draddy, Peer T. Pedersen and Francis R. Santangelo in connection with their sale of approximately 145,000 of the shares offered hereby, Tobey & Kirk, 52 Wall Street, New York, New York may be deemed an 'underwriter' as that term is defined in the Securities Act of 1933."

12. Upon information and belief, such amendment was duly filed by White Shield Corporation or its attorneys with the Securities and Exchange Commission, and the disclosures therein contained fully satisfied the requirements of the Securities Act of 1933.

Plaintiffs' Reply to Faulkner's First Counterclaim

AS AND FOR A THIRD DEFENSE TO
FAULKNER'S FIRST COUNTERCLAIM

13. The First Counterclaim asserted by defendant Faulkner against the plaintiffs fails to state a claim for which relief may be granted.

WHEREFORE, plaintiffs demand judgment against defendant Faulkner, Dawkins & Sullivan in accordance with the prayer of their complaint, and judgment dismissing the First Counterclaim asserted by defendant Faulkner, Dawkins and Sullivan against the plaintiffs; together with costs and disbursements.

CARRO, SPANBOCK & LONDIN
Attorneys for Plaintiffs

By _____
A Member of the Firm
10 East 40th Street
New York, New York 10016
Tel. (212) 685-2700

Tobey & Kirk's "Answer to Third Party Complaint"

CAPTION OMITTED

Third party defendant, Tobey & Kirk, by LAWLER, STERLING & KENT, its attorneys, for its answer to the third party complaint herein, alleges:

1. As to paragraph SEVENTY-THIRD of the answer and third party complaint, which paragraph repeats and realleges the "statements averred" in paragraphs FIRST through SEVENTY-SECOND, Tobey & Kirk makes the following answers:

(a) Lacks knowledge or information sufficient to form a belief as to the truth of the "statements averred" in paragraphs FIRST through FORTY-SEVENTH of the answer and third party complaint since those paragraphs contain merely admissions or denials or statements of lack of knowledge of the third party plaintiff, Faulkner, Dawkins & Sullivan.

(b) Lacks knowledge or information sufficient

to form a belief as to the truth of the "statements averred" in paragraphs FORTY-EIGHTH, FORTY-NINTH, FIFTY-FIRST, FIFTY-FOURTH and SIXTY-FOURTH of the answer and third party complaint.

(c) Denies all of the "statements averred" in paragraphs FIFTY-SIXTH, FIFTY-SEVENTH, FIFTY-EIGHTH, FIFTY-NINTH, SIXTIETH, SIXTY-FIRST, SIXTY-SECOND, SIXTY-THIRD, SIXTY-SIXTH, SIXTY-SEVENTH, SIXTY-EIGHTH, SEVENTIETH, SEVENTY-FIRST and SEVENTY-SECOND of the answer and third party complaint.

(d) Denies all of the "statements averred" in paragraph FIFTY-THIRD of the answer and third party complaint except admits that the said 44,000 shares of common stock sold by plaintiffs were part of a registered distribution.

(e) Denies all of the "statements averred" in paragraph SIXTY-FIFTH except admits that on or about June 15, 1971 third party plaintiff Faulkner, Dawkins & Sullivan refused to accept delivery of the 44,000 shares of the common stock of White Shield Corporation and so advised Tobey & Kirk.

2. Denies all of the allegations contained in paragraph SEVENTY-FOURTH of the answer and third party complaint.

3. As to the allegations contained in paragraph SEVENTY-FIFTH, third party defendant Tobey & Kirk repeats its answers contained in paragraph 1 hereof.

4. Denies all of the allegations contained in paragraph SEVENTY-EIGHTH.

5. Denies all of the allegations contained in paragraph SEVENTY-NINTH.

6. Denies all of the allegations contained in paragraph EIGHTIETH except admits that Faulkner, Dawkins & Sullivan agreed to purchase from plaintiffs herein through their agent Tobey & Kirk an aggregate of 44,000 shares of the common stock of White Shield Corporation at $14 per share.

Answer of Counterclaim-Defendant Tobey & Kirk to "Third Party Complaint"

7. Lacks knowledge or information sufficient to form a belief as to the allegations contained in paragraph EIGHTY-FIRST.

8. Lacks knowledge or information sufficient to form a belief as to the allegations contained in paragraph EIGHTY-SECOND.

9. Denies all of the allegations contained in paragraph EIGHTY-THIRD.

10. As to paragraph EIGHTY-FOURTH of the answer and third party complaint, repeats and realleges its answers contained in paragraphs 1 through 9 hereof.

11. Denies all of the allegations contained in subparagraphs EIGHTY-FIFTH (a), EIGHTY-FIFTH (b) and EIGHTY-FIFTH (c).

12. Denies all of the allegations contained in paragraph EIGHTY-SIXTH.

13. Denies all of the allegations contained in paragraph EIGHTY-SEVENTH.

14. Denies all of the allegations contained in paragraph EIGHTY-EIGHTH of the answer and third party complaint.

WHEREFORE, third party defendant Tobey & Kirk demands judgment dismissing the third party complaint, together with the costs and disbursements of this action.

LAWLER, STERLING & KENT

By _____
A Member of the Firm
Attorneys for Third Party
Defendant TOBEY & KIRK

Plaintiffs' Notice of Motion for Partial Summary Judgment

CAPTION OMITTED

NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND OTHER RELIEF

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Reginald Leo Duff, sworn to the 26th day of April, 1973, and upon the pleadings and all other papers and proceedings heretofore had herein, the undersigned will move before Hon. Murray I. Gurfein, United States District Judge, in Room 7 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on the 22nd day of May, 1973, for an Order:

(a) Pursuant to Rules 12(b) and 56(b) of the Federal Rules of Civil Procedure, dismissing the Second and Third Counterclaims asserted by defendant Faulkner, Dawkins & Sullivan ("Faulkner"), for failure to state a claim for which relief may be granted, or granting plaintiffs summary judgment thereon;

(b) In the alternative, pursuant to Rules 12(b)(6) and 12(h), dismissing for failure to state a claim for which relief may be granted, or striking as redundant, immaterial, impertinent or scandalous so much of the Second and Third Counterclaims asserted by defendant Faulkner as seeks recovery of punitive damages, because such damages are not recoverable by said defendant under the Securities Act of 1933, the Securities Exchange Act of 1934, or under the laws of the State of New York;

(c) Pursuant to Rules 13(h), 19(a) and 20(b), dismissing or severing defendant Faulkner's alleged counterclaim against counterclaim-defendant Tobey & Kirk because said

defendant purported to join and serve said counterclaim-defendant without leave of the Court. The presence of the counterclaim-defendant is not needed for a just adjudication of the action, and unduly complicates the action to the prejudice of the plaintiffs; and

(d) For such other, further and different relief as to the Court may seem just and proper in the premises.

PLEASE TAKE FURTHER NOTICE, that pursuant to Rule 9(c)(2) of the General Rules of the United States District Court for the Southern District of New York, opposing affidavits and answering memoranda shall be served upon the undersigned at least three days before the return date or any adjourned return date for the motion.

PLEASE TAKE FURTHER NOTICE, that effective the 1st day of May, 1973, undersigned firm's name will be changed to CARRO, SPANBOCK, LONDIN, RODMAN & FASS, 10 East 40th Street, New York, New York 10016, Tel. (212) 889-3600.

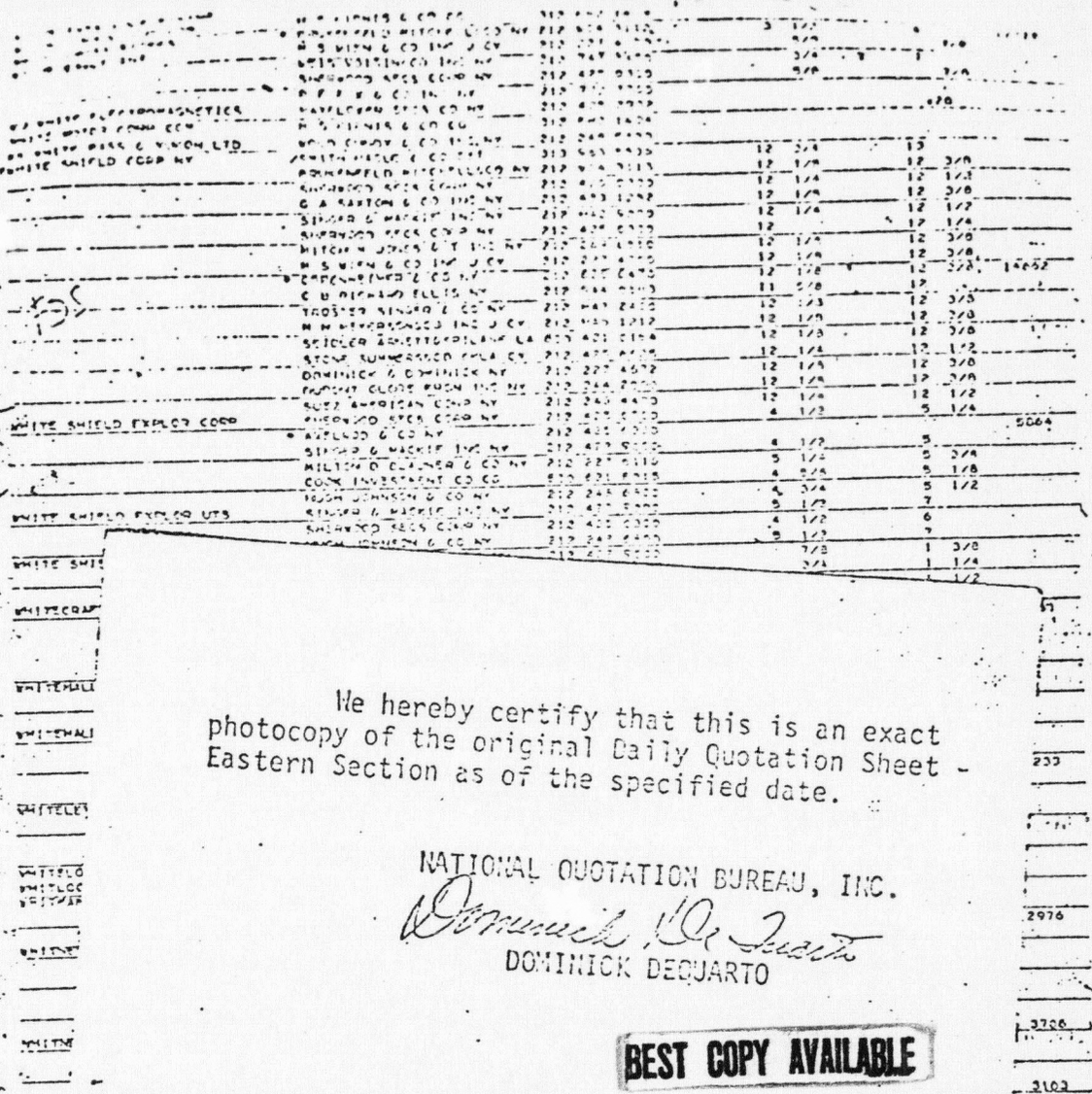
Dated: New York, N. Y.
April 26, 1973

Yours, etc.
CARRO, SPANBOCK & LONDIN
Attorneys for Plaintiffs

By _____
A Member of the Firm
10 East 40th Street
New York, N. Y. 10016
Tel. (212) 685-2700

Moving Affidavits and Exhibits Omitted

Exhibit to Omitted Affidavit Submitted in Support of Plaintiffs' Motion for Partial Summary Judgment



We hereby certify that this is an exact photocopy of the original Daily Quotation Sheet - Eastern Section as of the specified date.

NATIONAL QUOTATION BUREAU, INC.

Dominick DeQuarto

DOMINICK DEQUARTO

BEST COPY AVAILABLE

Affidavit of James Mullen, Submitted in Opposition to Plaintiffs' Motion for Partial Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

THOMAS J. BYRNES and FRANCIS R. SANTANGELO,

Plaintiffs,

73 Civ. 670 M.I.G.

-against-

AFFIDAVIT

FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC.,

Defendants.

- x

FAULKNER, DAWKINS & SULLIVAN,

Counterclaim Plaintiff,

-against-

THOMAS J. BYRNES, FRANCIS R. SANTANGELO and TOBEY & KIRK,

Counterclaim Defendants.

- x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JAMES MULLEN, being duly sworn, says:

1. I am presently employed by Josephthal & Co., a securities broker and dealer in New York City, as a stock trader.

2. In June of 1971, I was employed as a stock trader by Singer & Mackie, Inc. ("Singer"). Among other securities, I was a trader of the Common Stock of White Shield Corporation. of which Singer acted as a market-maker.

A22 (Plt.)

3. In or about May or June of 1971 and prior to June 8, 1971, Mr. Robert A. Mackie, Jr., the senior vice president of Singer, had informed me that a "shelf" registration for White Shield Corporation had been filed and advised me to be sure that any White Shield stock purchased in connection with Singer's market-making operations was not included in the "shelf" registration.

4. On or about June 8, 1971, I received a telephone call from a trader at Tobey & Kirk, whose name I do not presently recall, who offered shares of Common Stock of White Shield Corporation for sale to Singer. Before accepting the offer, I asked him whether the stock was included in the "shelf" registration. He answered that it was not. Accordingly, on or about June 8, 1971, I purchased on behalf of Singer from Tobey & Kirk an aggregate of 1,500 shares of Common Stock of White Shield Corporation.

James D. Mullen
James Mullen

Sworn to before me this
3rd day of May, 1973.

Barbara Andriani
Notary Public

BARBARA ANDRIANI
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Commission Expires March 30, 1974

Plaintiffs' Notice of Motion for Reargument or for Certification pursuant to 28 U.S.C. 1292(b)

RLA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS J. BYRNES and FRANCIS R. SANTANGELO, Plaintiffs, -against- FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC., Defendants.	NOTICE OF MOTION FOR REARGUMENT OR CERTIFICATION Index No. 73 Civ. 670 MIG
FAULKNER, DAWKINS & SULLIVAN, Counterclaim-Plaintiff, -against- THOMAS J. BYRNES, FRANCIS R. SANTANGELO and TOBEY & KIRK, Counterclaim-Defendants.	

SIRS:

PLEASE TAKE NOTICE, that pursuant to Rule 9(m) of the General Rules of this Court and 28 U.S.C. § ~~1929(b)~~ 1292(b), plaintiffs will move for reargument, or for certification pursuant to 28 U.S.C. § 1292(b), of this Court's decision filed June 19, 1973, dismissing the complaint herein for lack of jurisdiction of the subject matter; and for such other, further and different relief as to the Court may seem just and proper; before Hon. Murray I. Gurfein, U.S.D.J., on the 17th day of July, 1973 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard;

A.33

Plaintiffs' Notice of Motion for Reargument or for Certification pursuant to 28 U.S.C. 1292(b)

Plaintiffs contend that the Court overlooked the following matters in rendering its decision:

(a) An independent basis for federal jurisdiction exists under section 29 of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc;

(b) That there exist no considerations of non-removability or comity which preclude the Court's entertaining the action;

(c) That the Court improperly ascribed to the dictum of the S.E.C. Commissioners in Jaffee & Co. the effect of holding; and

(d) That the Court's permission to plaintiffs to replead their claims as counterclaims may not be effective.

Dated: New York, New York
July 2, 1973

Yours, etc.

CARRO, SPANBOCK, LONDIN,
RODMAN & FASS
Attorneys for Plaintiffs

By _____
A Member of the Firm
10 East 40th Street
New York, New York 10016
Tel.: (212) 685-2700

TO:
JACOBS PERSINGER & PARKER
Att'ys for Defendants
Faulkner, Dawkins & Sullivan
70 Pine Street
New York, N.Y. 10005

BORDEN & BALL
Att'ys for Defendants
Singer & Mackie, Inc.
345 Park Avenue
New York, New York 10022

LAWLER, STERLING & KENT
Att'ys for Third-Party
Defendants Tobey & Kirk
500 Fifth Ave.
New York, New York 10036

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FAULKNER, DAWKINS & SULLIVAN, Counterclaim-Plaintiff, -against- THOMAS J. BYRNES, FRANCIS R. SANTANGELO and TOBEY & KIRK, Counterclaim-Defendants.	:	REPLY AND COUNTERCLAIM of Thomas J. Byrnes and Francis R. Santangelo 73 Civ. 670 M.I.G.

Defendants to Counterclaims Thomas J. Byrnes ("Byrnes") and Francis R. Santangelo ("Santangelo"), for their answer or reply to the counterclaims asserted by counterclaim plaintiff Faulkner, Dawkins & Sullivan ("Faulkner"), in its "Answer and Counterclaims" ("Answer") by their attorneys Carro, Spanbock, Londin, Rodman & Fass, state:

1. In response to the allegations of paragraphs Seventy-third, Seventy-fifth and Eighty-fourth of Faulkner's Answer, Byrnes and Santangelo make no response to so much of the said paragraphs as incorporate portions of the Answer prior to paragraph Forty-seventh, and except as hereinafter more fully set forth, deny each and every allegation of fact or conclusion set forth in paragraphs First through Forty-seventh of the Answer.

2. Deny each and every allegation contained in paragraph Forty-eighth of the Answer except admit that on June 7, 1971 Faulkner agreed to purchase 44,000 shares of common stock

of White Shield Corporation ("White Shield") from Tobey & Kirk at a price of $14 per share.

3. Deny each and every allegation contained in paragraphs of the Answer numbered Forty-ninth, Fifty-fourth, Fifty-sixth, Fifty-ninth, Sixtieth, Sixty-second, Sixty-third, Sixty-sixth through Seventy-second, inclusive, Seventy-eighth, Seventy-ninth, Eighty-third, Eighty-fifth, Eighty-sixth, Eighty-seventh, Eighty-eighth.

4. Admit the allegations of paragraphs of the Answer numbered Fiftieth, Sixty-fifth and Seventy-sixth.

5. Admit that from time to time during the period relevant to this action Faulkner was a market-maker of the stock of White Shield, and except as so admitted deny each and every allegation contained in paragraph Fifty-first of the Answer.

6. Admit that the rules and regulations of the Securities and Exchange Commission ("SEC") prohibit a market-maker of a security from participating in a distribution of that security, and beg leave to refer to the said rules and regulations for the full text thereof; except as so admitted, deny each and every allegation contained in paragraph Fifty-second of the Answer.

7. Admit that a registration statement covering the 44,000 shares of common stock of White Shield was in effect when Byrnes and Santangelo sold said shares to Faulkner; and except as so admitted, deny each and every allegation contained

in paragraph Fifty-third of the Answer.

8. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs of the Answer numbered Fifty-fifth, Sixty-first, Sixty-fourth, Eighty-first.

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegation of paragraph Fifty-seventh of the complaint that the confirmation or comparison was not accompanied by a prospectus; and deny each and every other allegation contained therein.

10. Admit so much of paragraph Fifty-eighth of the Answer as alleges that Tobey & Kirk participated in the sale of common stock of White Shield sold by plaintiffs, as their agent; deny knowledge of information sufficient to form a belief as to the truth of the allegation thereof that Tobey & Kirk so participated on behalf of other selling shareholders; and beg leave to refer to the text of section 2(11) of the Securities Act and Rule 10b-6 for the terms thereof.

11. Referring to the allegations of paragraph Seventy-fourth of the Answer, admit that Faulkner purports to seek relief under the Declaratory Judgment Act, and except as so admitted deny that Faulkner is entitled to the declaration so prayed for.

12. Admit that Faulkner purports to invoke subject-matter jurisdiction under section 27 of the Securities Exchange Act and section 22 of the Securities Act, and on pendant juris-

diction, and deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph Seventy-seventh of the Answer.

13. Admit that on June 7, 1971 Faulkner agreed to purchase 44,000 shares of White Shield common stock from Byrnes and Santangelo, and except as so admitted deny each and every other allegation contained in paragraph Eightieth of the Answer.

14. Admit that on or about June 15, 1971 Faulkner purported to cancel its purchase of 44,000 shares of White Shield from Byrnes and Santangelo, and deny each and every other allegation contained in paragraph Eighty-second of the Answer.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE TO ALL COUNTERCLAIMS

15. The counterclaims fail to state a claim for which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE TO ALL COUNTERCLAIMS

16. During the week prior to June 7, 1971 and on that date, Faulkner was informed by Santangelo that the shares of White Shield which he and Byrnes had available for sale were in registration and that he and Byrnes could not agree to sell such shares until the registration statement was effective.

17. Upon information and belief, prior to June 7, 1971, there were tendered to Faulkner on behalf of Byrnes and Santangelo copies of the "Red Herring" prospectus in terms covering their shares of White Shield stock, but the tender was declined allegedly because Faulkner already had a copy.

18. As a market maker in the stock of White Shield prior to June 7, 1971, Faulkner knew or should have known that one or more registration statements applicable to shares of White Shield were before the Securities and Exchange Commission for processing, and Faulkner knew or should have known that Byrnes and Santangelo were selling shareholders of White Shield under one such registration statement.

19. In such circumstances Faulkner had no right to rely, and did not in fact rely upon any alleged representation by Byrnes or Santangelo that the 44,000 shares of common stock of White Shield referred to in paragraph Forty-eighth of the Answer "were not a part of a registered distribution", as alleged in paragraph Forty-ninth of the Answer.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE TO ALL COUNTERCLAIMS

20. A "comparison" exchanged between brokers on either side of a securities sale transaction is not a "confirmation" within the meaning of the Securities Act of 1933, and is not required to be accompanied or preceded by a prospectus.

Accordingly the Second Affirmative Defense alleged by Faulkner (and incorporated by reference in each of its counterclaims) is insufficient in law and fails to state a claim for which relief may be granted.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE TO ALL COUNTERCLAIMS

21. Repeat and incorporate herein by reference each and every allegation contained in paragraphs 16 through 20 of this Reply.

22. The sales transaction between Faulkner and Byrnes and Santangelo was negotiated by Santangelo and the sale was closed by telephone on June 7, 1971 by Vincent C. Ross, Jr., of counterclaim defendant Tobey & Kirk.

23. On information and belief, prior to June 7, 1971, Vincent C. Ross offered a copy of the "Red Herring" prospectus covering shares of White Shield stock owned by Byrnes and Santangelo to Faulkner.

24. Knowing that stock of White Shield being offered by Byrnes and Santangelo was part of a registered distribution, Faulkner knew or is presumed to have known at or prior to the sale that Tobey & Kirk was a statutory underwriter within the meaning of Section 2(11) of the Securities Act of 1933 and Rule 10b-6.

25. Upon information and belief, because a large number of selling shareholders under the various registration statements of White Shield would be using various brokers to sell their White Shield stock, and that some of those brokers might therefore become statutory underwriters although their identity could not or might not be known until after such sales were effected, the Securities and Exchange Commission agreed with White Shield to permit amendment, from time to time, of the registration statement(s) and prospectus(es) of White Shield to reflect the identity of such underwriters.

26. Accordingly, on or about June 14, 1971, Byrnes informed White Shield of Tobey & Kirk's sales on his and Santangelo's account of their White Shield stock, and the indentity of the purchasing brokers, and a "sticker amendment", dated June 18, 1971, to the prospectus made the following disclosure:

> "By virtue of its acting as broker on behalf of Messrs. Thomas J. Byrnes, Vincent Drady, Peer T. Pedersen and Francis R. Santangelo in connection with their sale of 145,000 of the shares offered hereby, Tobey & Kirk, 52 Wall Street, New York, New York may be deemed an 'underwriter' as that term is defined in the Securities Act of 1933."

27. Upon information and belief, copies of the prospectus delivered by Tobey & Kirk on behalf of Byrnes and Santangelo on and after June 18, 1971, contained the said sticker amendment.

28. The Third Affirmative Defense asserted in the Answer is insufficient in law, and to the extent each of Faulkner's counterclaims is based thereon, they fail to state a claim for which relief may be granted.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE TO ALL COUNTERCLAIMS

29. The sale transaction between Tobey & Kirk, as broker for Byrnes and Santangelo, and Faulkner did not involve a broker - customer relationship nor any extension of credit within the meaning of Regulation T of the Board of Governors of the Federal Reserve System nor any violation by Byrnes or Santangelo of that Regulation.

30. The Eighth Affirmative Defense of the Answer is insufficient as a matter of law, and to the extent each of Faulkner's counterclaims is predicated upon such alleged defense, they fail to state a claim for which relief may be granted.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE TO ALL COUNTERCLAIMS

31. Upon information and belief, in purporting to rescind the contract of sale between it and Tobey and Kirk, acting as broker for Byrnes and Santangelo, Faulkner did not comply with the rules of the National Association of Securities Dealers, Inc., by failing to deliver to Tobey & Kirk a properly executed NASD Reclamation or Rejection Form (Form #801). Accord-

ingly, Tobey & Kirk was entitled, under NASD Rules, to sell out the stock rejected by Faulkner without notice and in the best available market, for the account and liability of Faulkner.

32. The Ninth Affirmative Defense asserted in the Answer is insufficient in law, and to the extent each of Faulkner's counterclaims is predicated upon such alleged defense, they fail to state a claim for which relief may be granted.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE TO THE SECOND AND THIRD COUNTERCLAIMS

33. Repeat and incorporate herein by reference, each and every allegation contained in paragraphs of the Reply numbered 1 through 14, 16 through 20, 22 through 32, inclusive.

34. The Second and Third Counterclaims fail to state a claim for which relief may be granted because:

(a) As respects the claim of loss of $1,875 on the purchase and resale transaction, Faulkner was neither a "purchaser" nor a "seller", and has no standing to sue under the Securities Exchange Act or the Securities Act.

(b) As respects the claim of loss of $1,875 on the purchase and resale transation, Faulkner seeks recovery of anticipated profits, a measure of damages unavailable under the Securities Exchange Act or the Securities Act.

(c) The counterclaims state no cause of action

under Section 352-c of the New York General Business Law.

(d) As respects the claim for punitive damages, such damages are unavailable under the Securities Exchange Act, the Securities Act, the New York General Business Law or at common law.

(e) Faulkner sustained no damages as a result of the alleged wrongdoing by Byrnes, Santangelo or Tobey & Kirk because, at or subsequent to the time of its purported cancellation of the sales transaction with Byrnes and Santangelo, Faulkner could have purchased on the open market shares of the common stock of White Shield at less than the $14 per share contracted for with them, in order to deliver stock in accordance with its alleged resale contract, thereby increasing its profit on the latter transaction.

(f) To the extent the counterclaims may set forth a claim for relief against Byrnes and Santangelo, Faulkner is precluded from recovery by reason of its being in pari delicto, in that the obligations imposed upon it, as market maker, by the rules and regulations of the SEC are non-delegable, and it may not pass on to others its responsibility to ascertain the facts.

AS AND FOR A COUNTERCLAIM
AGAINST FAULKNER

35. Jurisdiction of this counterclaim is claimed by virtue of pendent jurisdiction.

36. Pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, Byrnes and Santangelo seek judgment declaring that the Nine Affirmative Defenses asserted by Faulkner in its Answer and Counterclaims are insufficient in law; that the transaction by which Byrnes and Santangelo sold 44,000 shares of the stock of White Shield to Faulkner on or about June 7, 1971 was lawful; and that Faulkner breached its admitted agreement to purchase such shares at $14 per share.

37. As a result of said breach by Faulkner, Byrnes sustained damages in the amount of $111,197.67, and Santangelo sustained damages in the amount of $107,983.12.

WHEREFORE, counterclaim defendants Thomas J. Byrnes and Francis R. Santangelo demand judgment:

(a) Dismissing each of the three counterclaims asserted againstthem by counterclaim plaintiff Faulkner, Dawkins & Sullivan;

(b) Declaring that each of the nine affirmative defenses asserted by counterclaim plaintiff Faulkner, Dawkins & Sullivan is insufficient in law, and that Faulkner, Dawkins & Sullivan breached its agreement of June 7, 1971 with counterclaim defendants Thomas J. Byrnes and Francis R. Santangelo for the purchase of 44,000 shares of the common stock of White Shield Corporation at a price of $14 per share; and

(c) Granting said counterclaim defendants judgment on their counterclaim against Faulkner, Dawkins & Sullivan, in the amount of $111,197.67 for counterclaim defendant Thomas J. Byrnes, and $107,983.12 for counterclaim defendant Francis R. Santangelo, with interest thereon from June 15, 1971, together with reasonable attorneys' fees and the costs and disbursements of this action.

CARRO, SPANBOCK, LONDIN, RODMAN & FASS
Attorneys for Counterclaim
Defendants Thomas J. Byrnes
and Francis R. Santangelo

By _____
A Member of the Firm
10 East 40th Street
New York, New York 10016
Tel. (212) 685 - 2700

Faulkner's Reply to Plaintiffs' Counterclaim

CAPTION OMITTED

Counterclaim-Plaintiff, Faulkner, Dawkins & Sullivan, by its attorneys, Jacobs Persinger & Parker, replying to the purported counterclaim of Thomas J. Byrnes and Francis R. Santangelo set forth in paragraphs "35" through "37" of their Reply and Counterclaim:

FIRST: Denies that Faulkner, Dawkins & Sullivan breached any agreement with Byrnes or Santangelo as alleged in paragraphs "36" and "37" and denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "37" pertaining to any damages allegedly sustained.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE
TO THE PURPORTED COUNTERCLAIM

SECOND: The purported counterclaim fails to state a claim for which relief may be granted.

WHEREFORE, Counterclaim-Plaintiff, Faulkner, Dawkins & Sullivan, prays judgment dismissing the purported counterclaim of Thomas J. Byrnes and Francis R. Santangelo, together with such other and further relief as the Court deems just and proper, including costs, disbursements and reasonable attorneys' fees.

JACOBS PERSINGER & PARKER

By _____
A Member of the Firm
Attorneys for Counterclaim-Plaintiff Faulkner, Dawkins & Sullivan
70 Pine Street
New York, New York 10005
(212) 344-1866

Excerpts from Singer & Mackie, Inc.'s Answers to Plaintiffs' Interrogatories

PLAINTIFFS' INTERROGATORIES TO SINGER & MACKIE

(Excerpts)

"1. With respect to the corporate status of defendant Singer, set forth:

* * *

"(g) Whether at any time between June 1, 1971 and October 15, 1971, said corporation purchased shares of the common stock of White Shield Corporation ('White Shield') for its own account, as principal, or for the accounts of any of its officers, directors or stockholders. If so, set forth:

"(i) The date of each such purchase;

"(ii) The identity of the purchaser, the number of shares purchased and the price;

"(iii) The identity of the selling broker-dealer and, if known, of the selling shareholder;

"(iv) Whether any such transaction involved shares of stock sold pursuant to a registration statement."

Dated: February 13, 1973.

SINGER'S ANSWER TO INTERROGATORY 1(g)

"No. 1

"(g) (i)(ii)(iii) During the period between June 1, 1971 and October 15, 1971, inclusive, Singer purchased approximately 125,000 shares of the Common Stock of White Shield Corporation for its own account as principal. Singer's records containing the date of each such purchase, the number of shares purchased and the price and identity of the selling broker-dealer will be made available for inspection at the offices of Singer, 40 Exchange Place, New York, New York, upon reasonable notice.

"(iv) Singer believes that the following transactions involved shares of stock sold pursuant to a registration statement:

Excerpts from Singer & Mackie, Inc.'s Answers to Plaintiffs' Interrogatories

Date	Selling Broker-Dealer	Number of Shares	Price
6-8-71	Tobey & Kirk	500	13 1/8
6-8-71	Tobey & Kirk	200	13 3/8
6-8-71	Tobey & Kirk	800	13 1/4
6-10-71	Tobey & Kirk	200	12 7/8
6-17-71	Gruntal & Co.	4000	12 1/8
6-17-71	Gruntal & Co.	3000	12 1/4
6-17-71	Gruntal & Co.	2000	12 1/4

"While there may have been other transactions involving shares of stock sold pursuant to a registation statement, Singer has no present knowledge or information to so indicate."

Sworn to the 17th day of May, 1973 by Robert A. Mackie, Jr.,
Executive Vice President

Faulkner, Dawkins & Sullivan's Interrogatories to Plaintiffs

16. Identify each communication between the above-named plaintiff and any other person pertaining to the rejection of 44,000 shares of Common Stock of White Shield Corporation by Faulkner on or about June 15, 1971.

18. Identify each communication between the above-named plaintiff and any other person pertaining to the resale or possible resale of the said 44,000 shares rejected by Faulkner.

19. Identify each communication between the above-named plaintiff and any other person pertaining to the resale or possible resale of the sale 1,500 shares rejected by Singer.

Answers of Plaintiff Santangelo

As to Interrogatory No. 16:

There were no written communications. Verbal communications were as follows:

(a) Plaintiff Byrnes, on behalf of Byrnesan, notified Vincent Ross and Anthony Cueva, partners of Tobey & Kirk, that this was their problem, and urged them to get their lawyers to resolve it. There were numerous verbal communications between Byrnes and Ross, some between Santangelo and Ross, during the period between June 15, 1971 and August 10, 1971. All of them were essentially requests for the status of the matter and of discussions with Faulkner, leading to the final report by Ross that Faulkner definitely would not accept the stock, and the advice that Byrnes and Santangelo begin to resell it.

(b) During the week of June 21, 1971, a meeting was held at the offices of Faulkner at which Vincent Ross, Byrnes, Santangelo, Marc Green, James McMillan, Jay Vanneck, and another Faulkner representative (presumably Ronald Lattuga) were present. The entire situation was discussed. Faulkner's representative said that its position was that it could not take the stock on the advice of Marc Green because to do so would involve a violation of Rule 10b-6. The meeting closed with the statement by a Faulkner representative that if there was any way that it could take the stock it would do so, and that Faulkner would get back to Ross. At this meeting Faulkner offered to resolve the situation if it meant the payment to plaintiffs of "a few thousand dollars," but plaintiffs pointed out that as of the date of the meeting, their losses exceeded $100,000 and that a token payment would not do.

As to Interrogatory No. 18:

Santangelo instructed Vincent Ross to sell the 22,000 shares of White Shield stock rejected by Faulkner at Ross's discretion, but in a manner so as not to hurt the market, since Byrnes and Santangelo had an aggregate of 45,500 shares to sell.

As to Interrogatory No. 19:

On information and belief, Vincent Ross informed Byrnes in August 1971 that he was required officially to notify Singer when he sold out the shares of White Shield that had been rejected by Singer. Byrnes, on behalf of Byrnesan, told Ross to sell the Faulkner-rejected stock first, and then to sell the shares rejected

by Singer as a unit, so that there could be no confusion as to which sales were for which dealer.

Answers sworn to by plaintiff Santangelo on July 24, 1973.

Answers of Plaintiff Byrnes:

As to Interrogatory No. 16:

Identical to Santangelo's Answer except (a) begins "Byrnes" instead of "Plaintiff Byrnes."

As to Interrogatory No. 18:

Byrnes instructed Vincent Ross to sell the 22,000 shares of White Shield stock rejected by Faulkner at a price of $9 per share or better, over as long a period as was necessary to dispose of the stock, but not to sell more than 1,000 shares at a time so as not to hurt the market, since Byrnes and Santangelo had an aggregate of 45,500 shares to sell.

As to Interrogatory No. 19:

Identical to Santangelo's Answer except does not begin with "On information and belief."

Answers sworn to by plaintiff Byrnes on July 18, 1973.

Interrogatories of Faulkner, Dawkins & Sullivan to Tobey & Kirk

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CAPTION OMITTED

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4. Set forth in detail each fact or circumstance forming a basis for the determination not to resell the stock rejected by Faulkner until the first date set forth in answer to interrogatory 3(a) above, and name the person or persons who made such determination.

5. Identify each communication and document pertaining to any fact or circumstance set forth in answer to Interrogatory 4.

Tobey & Kirk's Answers to Faulkner's Interrogatories

CAPTION OMITTED

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4. The attorneys for both sides were trying to come to some settlement so that the original sale of shares to Faulkner could eventually be completed despite the initial rejection by Faulkner.

By the end of June 1971, the stock was down to approximately $9.00 bid. Upon information and belief, the market for the stock was quite weak from that time until the time when it was eventually sold.

Upon information and belief, the decision to make such sales was made collectively by Byrnes, Santangelo and Vincent Ross in consultation with attorneys.

5. Communications between Tobey & Kirk and Faulkner with respect to the attempts to consummate the original sale were carried out by Tobey & Kirk's attorneys, Lawler, Sterling & Kent. Upon information and belief, all such communications with the exception of a certain meeting held on or about June 21, 1971 were oral communications made over the telephone with attorneys for Faulkner.

Documentation as to the market price of White Shield stock during the months of June, July, August and September 1971 is available in the "Pink Sheets" of the National Quotation Bureau.

Sworn to by Antonio S. Cueva January 2, 1974

Tobey & Kirk's Additional Answers to Faulkner's Interrogatories

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CAPTION OMITTED

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5. Supplementing the answer to Interrogatory 5 as contained in defendant Tobey & Kirk's original answers to interrogatories of Faulkner, Dawkins & Sullivan.

H.M. Hicks, Jr., a partner of Lawler, Sterling & Kent, attorneys for Tobey & Kirk, conferred by telephone with Marc Green, Esq., counsel for Faulkner, Dawkind & Sullivan, on June 15, 1971 after being informed by Mr. Vincent Ross of Tobey & Kirk that problems had arisen between Tobey & Kirk and Faulkner, Dawkins & Sullivan relating to the sale by

Tobey & Kirk to Faulkner, Dawkins & Sullivan of 44,000 shares of White Shield Corporation.

Mr. Green advised Mr. Hicks that Faulkner, Dawkins & Sullivan were returning the shares purchased and cancelling the purchase because of alleged violations of Section 10-b of the Securities and Exchange Act of 1934 by Tobey & Kirk.

Mr. Hicks who was not a securities lawyer informed Mr. Green that his partner Peter Landau, who was a specialist in securities law would call him. Mr. Landau conferred by telephone with Tobey & Kirk to ascertain the facts and then conferred by telephone with Mr. Green. Mr. Landau discussed with Mr. Green the legal problems involved and advised Mr. Green that in Mr. Landau's opinion no violation of securities law had occurred or been committed by Tobey & Kirk and that the original transaction was binding on Faulkner, Dawkins & Sullivan.

Mr. Green disagreed and no discussion of settlement occurred between Lawler, Sterling & Kent and Mr. Green.

A meeting was held on June 21, 1971 which was attended by Francis R. Santangelo, Thomas J. Byrnes, Vincent Ross, Marc Green, Jay Vanneck and Jack Cirenza. At that meeting, Faulkner explained its theories upon which it had cancelled the transaction to which Tobey & Kirk disagreed.

Sworn to by Antonio S. Cueva November 26, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS J. BYRNES and FRANCIS R. SANTANGELO,

Plaintiffs,

-against-

FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC.,

Defendants.

73 Civ. 670 HFW

FAULKNER, DAWKINS & SULLIVAN,

Counterclaim-Plaintiff,

-against-

THOMAS J. BYRNES, FRANCIS R. SANTANGELO and TOBEY & KIRK,

Counterclaim-Defendants.

STIPULATION

Solely for purposes of the pending motions for summary judgment and other relief, and for no other purpose whatever, the undersigned hereby stipulate as to the correctness of the following facts which the Court may deem to be true for purposes of said motions.

Insofar as this stipulation sets forth facts bearing upon the resale by defendant and counterclaim-plaintiff Faulkner, Dawkins & Sullivan ("Faulkner") of some of the stock which it had purchased from plaintiffs, or upon its cancellation of those resales, or insofar as this stipulation sets forth facts bearing upon the resale by plaintiffs of the stock which had been rejected

by Faulkner, or upon communications between plaintiffs and/or Tobey with Singer & Mackie, Inc., such facts are disclosed in the records of Faulkner, or of plaintiffs or of counterclaim defendant Tobey & Kirk, respectively, and are set forth here for the Court's convenience. The other stipulating parties do not themselves attest to the correctness of such data, although they do not presently have evidence to rebut it.

1. Prior to June 7, 1971, plaintiffs and their associates Peer T. Pedersen and Vincent deP. Draddy, owned an aggregate of 148,000 shares of common stock of White Shield Corporation ("White Shield"), some of which were registered in the name of Byrnesan Associates, a joint venture of which plaintiffs were equal partners. The aforesaid shares were included in a registration statement filed by White Shield with the Securities and Exchange Commission under the Securities Act of 1933.

2. The said registration statement registered 422,513 shares of White Shield stock, to be offered "from time to time" through broker-dealer members of the National Association of Securities Dealers, Inc. ("NASD"), by approximately twenty-seven selling shareholders, including plaintiffs and their associates, and was declared effective on June 7, 1971. The prospectus covering plaintiffs' said shares bears the date of June 7, 1971.

3. Prior to June 7, 1971, plaintiffs and their said associates had arranged with counterclaim-defendant Tobey & Kirk, which was registered as a securities broker-dealer with the Securities and Exchange Commission and was a member firm of the

NASD, to sell their stock when the said registration statement became effective. Prior to June 7, 1971, plaintiffs informed Tobey & Kirk that the securities were being registered under the Securities Act of 1933, and delivered to Tobey & Kirk copies of the "red herring" or preliminary prospectus with respect to said securities.

4. On June 7, 1971, Tobey & Kirk sold to Faulkner 44,000 shares of the common stock of White Shield owned by the plaintiffs and included in the said registration statement, at a price of $14.00 per share.

5. On June 7, 8 and 9, 1971, Tobey & Kirk sold an additional 100,000 shares of the stock owned by plaintiffs and their said associates, and included in the said registration statement, to seventeen other securities broker-dealers, as follows:

Purchaser	No. Shares
Suez American Corp.	2,500
F. I. DuPont, Glore Forgan, Inc.	700
Seidler Arnett & Spillane, Inc.	500
McDonald Shobar & Co.	200
Sherwood Securities Corp.	5,400
Singer & Mackie, Inc.	1,500
G. A. Saxton & Co.	200
Brukenfeld, Mitchell & Co.	9,000
Troster, Singer & Co.	1,000
Dominick & Dominick, Inc.	500
Stone, Summers & Co.	1,900
C. B. Richard, Ellis & Co.	100
Mitchum, Jones & Templeton, Inc.	500
Leason & Co.	71,900
M. S. Wien & Co., Inc.	1,100
M. H. Meyerson & Co. Inc.	2,000
Tobey & Kirk	1,000
Total other than Faulkner	100,000

6. Of these seventeen broker-dealers, all but three were making a market in the stock of White Shield by listing their names in the "Pink Sheets" of the National Quotation Bureau, Inc., on one or more of the three days. The three that were not in the "Pink Sheets" were McDonald Shobar & Co., Leason & Co., and Tobey & Kirk.

7. On June 7, 1971, and prior and subsequent thereto, Faulkner acted as a market-maker in the stock of White Shield, and regularly entered bid and asked quotations for said stock in NASDAQ, the automated quotation system of the NASD. Faulkner's name was also regularly entered in the "Pink Sheets" for White Shield stock, generally without price quotations.

8. Faulkner ceased to enter quotations for the White Shield stock in NASDAQ after June 16, 1971. Its name was listed in the Pink Sheets for the stock of White Shield, but without price quotations, on each business day from June 1 through June 14, 1971, inclusive, and on June 17, 18 and 22, 1971, but not thereafter.

9. The White Shield stock which Faulkner purchased from Tobey & Kirk on June 7, 1971, was purchased by it for its own account as principal.

10. For about a month prior to the sale in suit, James MacMillen, a stock trader who was then employed by Faulkner, knew of the pendency of a registered distribution of White Shield stock which was eventually underwritten by Leason & Co. and is referred to in the testimony as "the Leason secondary".

11. Tobey & Kirk selected the purchasers of the registered White Shield stock owned by plaintiffs and their associates (other than the three dealers not making a market in the stock), from the "Pink Sheets".

12. On or about June 7, 1971, Faulkner sent a written "comparison" or "confirmation" of the purchase to Tobey & Kirk, which showed that Faulkner was a market-maker in the stock of White Shield.

13. On or about June 7, 1971, Tobey & Kirk sent a written "comparison" or "confirmation" of the said sale to Faulkner, which did not show that the stock was part of a registered distribution, and which was not accompanied or preceded by a prospectus. Tobey & Kirk did not deliver a prospectus to Faulkner prior to the delivery of the stock certificates on June 15, 1971.

14. On or about June 15, 1971, Tobey & Kirk delivered to Faulkner the certificates for the stock which it had sold to it on June 7, 1971, together with copies of the prospectus. Faulkner rejected the securities and informed Tobey & Kirk that the transaction was illegal.

15. Faulkner sent a "DK" ("Don't Know") notice to Tobey & Kirk with respect to the transaction in suit, which was received by Tobey & Kirk on or about June 16, 1971. At no time did Faulkner deliver to Tobey & Kirk an Official NASD Reclamation or Rejection Form # 801 with respect to the transaction in suit.

16. The prospectus dated June 7, 1971 which was applicable to plaintiffs' stock did not identify Tobey & Kirk by name

as underwriter of the stock for plaintiffs and other selling stockholders.

17. The "Plan of Distribution" in the June 7, 1971 prospectus applicable to the stock of the plaintiffs set forth in pertinent part (page 4):

> "The shares of Common Stock offered hereby will be offered from time to time by the selling shareholders in the over-the-counter market, and at negotiated prices to institutional purchasers and to purchasers of blocks of 5,000 shares or more.
>
> "The selling shareholders may pay regular brokerage commissions not exceeding those permitted to members of the National Association of Securities Dealers, Inc. who render assistance to them in connection with the sale of the shares offered hereby. The selling shareholders and such participating members of the National Association of Securities Dealers, Inc. may be deemed to be underwriters as that term is defined in the Securities Act of 1933. The selling shareholders have agreed to indemnify the Company from civil liabilities under the Securities Act of 1933 arising out of the use of this prospectus as such liability may relate to information included herein furnished by the selling shareholders."

18. On or about June 18, 1971, White Shield filed with the Securities and Exchange Commission, and published, a supplement to the prospectus dated June 7, 1971, relating to the shares in suit, which read as follows:

"WHITE SHILLD CORPORATION

Supplement dated June 18, 1971 to Prospectus dated June 7, 1971

Page 4 PLAN OF DISTRIBUTION

> By virtue of its acting as broker on behalf of Messrs. Thomas J. Byrnes, Vincent Draddy, Peer T. Pedersen and Francis R. Santangelo in connection with their sale of approximately 145,000 of the shares offered hereby, Tobey & Kirk, 52 Wall Street, New York, New York may be deemed an 'underwriter' as that term is defined in the Securities Act of 1933."

19. (a) Neither plaintiffs nor Tobey & Kirk delivered a "red herring" or preliminary prospectus to Faulkner.

(b) Tobey & Kirk did not deliver "red herring" or preliminary prospectuses to other purchasers identified in paragraph 5 hereof.

20. Neither plaintiffs nor Tobey & Kirk redelivered to Faulkner the stock which Faulkner rejected on or about June 15, 1971.

21. On or about June 15, 1971, Marc Green, Esquire, house counsel of Faulkner, discussed the reasons for and the validity of Faulkner's cancellation of the trade with Tobey & Kirk in separate telephone conversations with Vincent Ross of Tobey & Kirk, Melville Hicks, Esq. and Peter Landau, Esq., members of Tobey & Kirk's outside law firm. Mr. Landau informed Mr. Green that he was instructing Tobey & Kirk to redeliver the stock, and Mr. Green told him that the stock would be refused.

22. On or about June 21, 1971, Ray Merritt, Esq., an attorney acting for plaintiff Byrnes, advised Mr. Green in a telephone conversation that in his opinion Faulkner was obligated to accept the stock. Mr. Green disagreed, and when Mr. Merritt suggested arbitration, Mr. Green said that Faulkner would prefer litigation.

23. On or about June 21, 1971, the two plaintiffs and Vincent Ross of Tobey & Kirk met with various representatives of

Faulkner, including Marc Green, Esq., Jay Vanneck, Jack Cirenza and James MacMillen. At that meeting Faulkner explained why it cancelled the transaction.

24. All discussions or communications between Faulkner and either the plaintiffs or Tobey & Kirk, terminated, with respect to the transaction in suit, after a telephone conversation on June 23, 1971, between Marc Green, Esq. of Faulkner and Vincent Ross of Tobey & Kirk, in which Mr. Green confirmed to Mr. Ross his view that the transaction was illegal and that Faulkner could not accept the stock.

25. Prior to June 7, 1971, Faulkner had discussed with two other broker-dealers who made a market in the stock of White Shield, Singer & Mackie and Mitchum, Jones & Templeton, Inc., the possibility of a resale to them of a portion of the 44,000 shares of White Shield stock, if it were purchased. On June 7, 1971, following the trade with Tobey & Kirk, Faulkner sold to Singer & Mackie 15,000 shares of White Shield at $14-1/8 per share, and 5,000 shares at $14 per share to Mitchum, Jones & Templeton, for an aggregate mark-up of $1,875.

26. Following its rejection of the 44,000 shares of White Shield tendered by Tobey & Kirk on June 15, 1971, Faulkner informed Singer & Mackie and Mitchum, Jones and Templeton that Tobey & Kirk had attempted to deliver to it distribution stock and that Faulkner had rejected delivery, and Faulkner thereupon cancelled its trades with Singer & Mackie and Mitchum, Jones & Templeton. Both broker-dealers agreed to such cancellation without penalty.

27. On June 16, 1971, when Tobey & Kirk attempted to deliver the 1,500 shares of White Shield which it had sold for plaintiffs to Singer & Mackie, Inc. on June 8, 1971, which stock was also included in the registration statement, Singer & Mackie rejected delivery of such stock, and on June 17, 1971 sent Tobey & Kirk an Official NASD Reclamation or Rejection Form # 801, which stated "Trade Cancelled--Shelf Registration Stock".

28. Plaintiffs claim that they resold at a loss the stock which had been rejected by Faulkner and by Singer & Mackie, respectively. Plaintiffs claim they effected resales through Tobey & Kirk on the open market, as follows: Byrnes sold for the account of Faulkner between August 10 and September 17, 1971, and for the account of Singer & Mackie on September 17, 1971. Santangelo sold for the account of Faulkner between August 9 and September 28, 1971, and for the account of Singer & Mackie on September 28 and 29, 1971. Neither plaintiff attempted to resell any of the stock which had been rejected by Faulkner and Singer & Mackie prior to August 9, 1971.

29. In the tabulation below, are set forth for each trading day between May 17, 1971 and October 15, 1971, inclusive, following the date, (a) the number of broker-dealers listed in the "Pink Sheets" for the stock of White Shield for that date; (b) the high "bid" price listed in the "Pink Sheets" for that date; and (c) the low "bid" price listed in the "Pink Sheets" for that date.

Date (1971)	(a) Number of Brokers	(b) High Bid	(c) Low Bid
May 17	15	13-7/8	13-3/8
May 18	16	13-5/8	13-3/8
May 19	15	14-1/8	14
May 20	15	14-1/4	14
May 21	15	14-1/2	13-1/2
May 24	15	14-1/8	13-5/8
May 25	15	14-1/2	13-1/2
May 26	15	13-5/8	13-1/2
May 27	15	13-5/8	13-1/4
May 28	15	13-3/8	13-1/4
June 1	14	13	13
June 2	15	13-1/2	13-1/4
June 3	16	13-5/8	13-1/2
June 4	15	13-5/8	13-1/2
June 7	15	13-5/8	13-1/4
June 8	16	14-1/4	12-3/4
June 9	16	13-3/4	12-1/2
June 10	14	13	12-7/8
June 11	16	12-7/8	12-3/4
June 14	16	12-1/2	12-3/8
June 15	17	12-3/4	11-5/8
June 16	15	12	11
June 17	18	12-1/4	11
June 18	16	12-3/4	12-1/8
June 21	15	12-7/8	12-3/4
June 22	17	12-7/8	10-1/4
June 23	15	10-3/4	9-1/4
June 24	13	10-5/8	9-3/8
June 25	12	10-1/2	10-3/8
June 28	12	10-1/2	10-3/8
June 29	14	10-1/2	10-1/4
June 30	12	10-1/4	9-3/8
July 1	13	10-3/4	9-3/4
July 2	12	10-1/4	10
July 6	12	10-1/8	10
July 7	12	10-1/4	10-1/8
July 8	13	11-3/8	10-3/8
July 9	13	11-3/8	11-1/4

Date (1971)	(a) Number of Brokers	(b) High Bid	(c) Low Bid
July 12	15	12	11-1/2
July 13	15	12-1/4	12-1/8
July 14	14	11-1/2	11-3/8
July 15	18	11-3/8	11-1/8
July 16	14	11-3/8	10-3/4
July 19	15	10-3/4	10-1/2
July 20	14	10-3/4	10-1/4
July 21	13	10-3/4	10-3/8
July 22	14	10-1/2	10-3/8
July 23	14	10-1/2	10-1/4
July 26	12	10-3/8	10-1/4
July 27	12	9-7/8	9-3/4
July 28	12	9-1/2	9-3/8
July 29	11	10-1/8	9-1/2
July 30	12	9-1/2	9-1/8
Aug. 2	13	9	8-1/2
Aug. 3	12	8-7/8	8-5/8
Aug. 4	13	8-5/8	8-1/2
Aug. 5	12	8-3/4	8-5/8
Aug. 6	12	8-3/4	8-5/8
Aug. 9	11	9	8-3/4
Aug. 10	12	9	8-3/4
Aug. 11	12	9	8-3/4
Aug. 12	12	9-3/8	8-7/8
Aug. 13	11	9-5/8	9-1/4
Aug. 16	10	9-1/2	9-1/8
Aug. 17	11	9-3/8	9-1/4
Aug. 18	11	9-1/2	9-3/8
Aug. 19	10	9-3/8	9-1/4
Aug. 20	10	9-1/4	9-1/8
Aug. 23	10	9-3/8	9-1/8
Aug. 24	11	9-3/8	9-1/4
Aug. 25	13	9-3/8	8-7/8
Aug. 26	13	8-7/8	8-3/8
Aug. 27	11	8-5/8	8-1/2
Aug. 30	11	8-3/8	8-1/8
Aug. 31	12	8-3/8	8-3/8
Sep. 1	12	8-5/8	8-1/2
Sep. 2	13	8-5/8	8-1/8
Sep. 3	11	8	7-3/4

Date (1971)	(a) Number of Brokers	(b) High Bid	(c) Low Bid
Sep. 7	11	8	7-7/8
Sep. 8	11	7-5/8	7-1/2
Sep. 9	12	7-1/2	7-1/8
Sep. 10	12	7-1/2	7-1/8
Sep. 13	12	7-3/4*	7-1/2
Sep. 14	13	9-3/8	8-1/4
Sep. 15	13	8-7/8	8-7/8
Sep. 16	13	9-3/8	9
Sep. 17	13	9-3/8	9-1/4
Sep. 20	14	9-1/4	9-1/8
Sep. 21	13	9	7-3/4
Sep. 22	13	8-1/4	8
Sep. 23	13	8	7-5/8
Sep. 24	13	8	7-7/8
Sep. 27	14	8-1/8	8
Sep. 28	13	8-1/2	8
Sep. 29	12	9	8-3/4
Sep. 30	14	9-1/2	8-1/2
Oct. 1	12	9-5/8	8-3/4
Oct. 4	12	10-1/8	9-3/8
Oct. 5	12	10-1/8	9-7/8
Oct. 6	12	9-3/4	9-5/8
Oct. 7	12	10	9-5/8
Oct. 8	12	9-3/4	9-1/8
Oct. 11	13	9-5/8	9-1/8
Oct. 12	12	9-5/8	8
Oct. 13	12	9-1/4	9
Oct. 14	12	9-1/8	8-1/2
Oct. 15	12	9	8-1/4

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*A "high bid" of $8-3/4 is crossed out on copy of Pink Sheets received by plaintiffs from NQB, Inc., but not on copy received by Faulkner.

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30. Neither the plaintiffs nor Tobey & Kirk notified Faulkner that the stock they sold in the open market between August 9, 1971 and September 28, 1971 was for the account of Faulkner, or that the plaintiffs intended to hold Faulkner liable for the difference between the June 7, 1971 contract price and the proceeds they realized on the resale of the stock which had been rejected by Faulkner.

31. In July, 1972, plaintiffs commenced an action in the Supreme Court of the State of New York, County of New York, against Faulkner and Singer & Mackie, seeking to recover the difference between the respective contract prices that the two defendants had agreed to pay, and the proceeds allegedly realized for the respective accounts of the two defendants upon the resale of the stock in the open market. By agreement of the parties, that action has been stayed pending a determination of the present action.

Dated: New York, New York
February 13, 1975

CARRO, SPANBOCK, LONDIN, RODMAN & FASS
Attorneys for plaintiffs and counter-claim defendants Thomas J. Byrnes and Francis R. Santangelo

By _____
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HALL, DICKLER, LAWLER, KENT & HOWLEY
Attorneys for counterclaim defendant Tobey & Kirk

By _____
A Member of the Firm

460 Park Avenue
New York, New York 10022
Tel. (212) 838-4600

Plaintiffs' Notice of Motion for Summary Judgment

CAPTION OMITTED

S I R S :

PLEASE TAKE NOTICE, that on the 17th day of April, 1975, at 2:00 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, the undersigned will move for an Order, pursuant to Rules 56(a) and 56(b) of the Federal Rules of Civil Procedure, granting plaintiffs and counterclaim defendants Thomas J. Byrnes and Francis R. Santangelo (hereinafter "plaintiffs") summary judgment, as more fully set forth below. The said motion will be made in a motion part of the United States District Court for the Southern District of New York, before Hon. HENRY F. WERKER, United States District Judge, in the United States

Court House, Foley Square, Borough of Manhattan, City, County and State of New York, in the Courtroom then occupied by said Judge, and is made upon the Stipulation of the Parties dated February 13, 1975 which is filed herewith; the annexed affidavits (each sworn to the date indicated) of George J. Solomon, Esquire, (February 10, 1975), of plaintiff Thomas J. Byrnes February 7, 1975), of plaintiff Francis R. Santangelo (February 12, 1975), of Peter Landau, Esq. (February 12, 1975), and the Exhibits thereto numbered "1" through "9" inclusive, and "11" (Exhibit "10" to the Santangelo affidavit, consisting of the transcript of his testimony taken by the present counsel for defendant and counterclaim plaintiff Faulkner, Dawkins & Sullivan (hereinafter "Faulkner") in the related New York Supreme Court action between the parties, is being filed separately herewith and is incorporated by reference); and upon Faulkner's Answers, sworn to March 30, 1973, to plaintiffs' Interrogatories, heretofore filed with the Court; and upon the depositions of Faulkner, given by Ronald J. Lattuga and Marc R. Green, Esquire, respectively, and the deposition of counterclaim defendant Tobey & Kirk (hereinafter "Tobey & Kirk") given by Vincent Ross, all of which have been or are being filed with the Court; and upon the Complaint, Faulkner's Answer and Counterclaims, the Reply and Counterclaims of the plaintiffs, and Faulkner's Reply thereto, all of which have heretofore been filed with the Court; and upon all of the papers and proceedings heretofore had herein; for an Order:

(1) Pursuant to FRCP 56(a), granting plaintiffs Byrnes and Santangelo judgment dismissing the Fourth Affirmative Defense asserted by Faulkner to the Complaint and to the Counterclaims of said plaintiffs, because the transaction in suit did not violate Rule 10b-6, 17 CFR § 240.10b-6, and to the extent such alleged violation is based upon the decision of the Securities and Exchange Commission in Matter of Jaffee, Exchange Act Release No. 8866, dated April 20, 1970, CCH Sec.L.Rep. ¶ 77,805 (1970), said decision is contrary to law and should be overruled. (Memo. of Law, Point I).

(2) Pursuant to FRCP 56(a), granting plaintiffs Byrnes and Santangelo summary judgment dismissing the First Affirmative Defense asserted by Faulkner to the Complaint and to the Counterclaims of said plaintiffs, because there is no material issue of fact remaining with respect to said defense because the testimony of all of the participants to the several conversations leading to the transaction in suit establishes that plaintiffs did not misrepresent any material fact, nor omit to state any material fact which was required to be stated, in connection with the purchase and sale of the security in suit, and said plaintiffs did not thereby violate Rule 10b-5 of the Securities and Exchange Commission, 17 CFR § 240.10b-5, section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), section 352-c of the New York General Business Law, and were not guilty of fraud or misrepresentation under the common law of New York; and for the additional reason that Faulkner complains at most of the alleged failure of plaintiffs to disclose conclusions of law derived from facts which

either were known to Faulkner or were in the public domain and were readily ascertainable by Faulkner, and which it had an affirmative legal duty to ascertain. (Memo. of Law, Point II).

(3) Pursuant to FRCP 56(a), granting plaintiffs Byrnes and Santangelo judgment dismissing the Third Affirmative Defense asserted by Faulkner to the Complaint and to the Counterclaims of said plaintiffs because the alleged failure of the prospectus in suit to identify Tobey & Kirk by name as a statutory underwriter of plaintiffs' securities was not a material omission of facts under sections 2(11), 7 or 10 of the Securities Act of 1933, 15 U.S.C. §§ 77b(11), 77g, 77j, because Faulkner knew the facts and could supply the legal conclusions therefrom, because the disclosure actually made by the prospectus was sufficient, and because the alleged omission was not "material". (Memo. of Law, Point II(c)).

(4) Pursuant to FRCP 56(b), granting plaintiffs Thomas J. Byrnes and Francis R. Santangelo summary judgment dismissing the Second and Third Counterclaims asserted by Faulkner against the plaintiffs, because said counterclaims fail to state a claim for which relief may be granted to Faulkner, both for the reasons set forth in paragraphs (1), (2) and (3) hereof, and also because (a) Faulkner, by unilaterally rescinding the transaction in suit, lacks standing to maintain said counterclaims because it is neither a "purchaser" nor a "seller" of a security; (b) because Faulkner sustained no damages cognizable under section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), in that it seeks to recover only the loss of its anticipated profits; and (c)

because this Court may not award punitive damages to Faulkner under section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), or, in the light of the nature of the alleged wrongdoing by plaintiffs of which Faulkner complains, under the common law of the State of New York. (Memo. of Law, Point III).

(5) Pursuant to FRCP 56(a), granting plaintiffs summary judgment dismissing the Second Affirmative Defense asserted by Faulkner to the Complaint and to the Counterclaims of said plaintiffs, because plaintiffs, as sellers, did not send to Faulkner, as purchaser of a security, any writing confirming the sale of the security in suit, as to which section 2(10) of the Securities Act of 1933, 15 U.S.C. § 77b(10), can or does apply, so that plaintiffs could not and did not violate sections 5 or 10 of the Securities Act, 15 U.S.C. §§ 77e, 77j; and the exchange of brokers' comparisons between Tobey & Kirk and Faulkner, which was was required by virtue of the membership of each of those parties in the National Association of Securities Dealers, Inc., pursuant to Section 9(a) of the Uniform Practice Code thereof, adopted pursuant to section 15A(b)(7) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o-3(b)(7), and is not a writing which was sent by Tobey & Kirk as an "agent" of the plaintiffs, nor is it a writing as to which section 2(10) of the Securities Act, 15 U.S.C. § 77b(10), attaches or applies. (Memo. of Law, Point IV).

(6) Pursuant to FRCP 56(a), granting plaintiffs Thomas J. Byrnes and Francis R. Santangelo summary judgment dismissing the Fifth Affirmative Defense asserted by Faulkner to the Complaint

and to the Counterclaims of said plaintiffs, because a purchaser of a security in an unsolicited transaction has no right to rescind his purchase merely upon his receipt of a prospectus, without alleging and proving that the sale of the security was accomplished by means of the misrepresentation or omission of material facts or otherwise violated provisions of the substantive law; and if such right did exist, it could not be invoked or asserted by a securities broker-dealer which had been making a market in the very security as to which such prospectus was applicable. (Memo. of Law, Point V).

(7) Pursuant to FRCP 56(a), granting plaintiffs Thomas J. Byrnes and Francis R. Santangelo summary judgment dismissing the Eighth Affirmative Defense asserted by Faulkner to the Complaint and to the Counterclaims of said plaintiffs, because Regulation "T" promulgated by the Board of Governors of the Federal Reserve System, 12 CFR § 220 et seq., has no application to the transaction in suit, or to said plaintiffs, because (a) plaintiffs are not broker-dealers, and the Regulation applies only to extensions of credit by broker-dealers; (b) because Faulkner was not the "customer" either of plaintiffs or of counterclaim defendant Tobey & Kirk, within the meaning of Regulation T, which applies only to extensions of credit to "customers" of the broker-dealer; (c) because Tobey & Kirk was not the "creditor" of Faulkner within the meaning of said Regulation; and (d) because the transaction in suit does not involve an "extension of credit," lawful or unlawful. (Memo. of Law, Point V).

(8) Pursuant to FRCP 56(a), granting plaintiffs Thomas J. Byrnes and Francis R. Santangelo summary judgment dismissing the Sixth, Seventh and Ninth Affirmative Defenses asserted by Faulkner the Complaint and to the Counterclaims of said plaintiffs, because each of said defenses, insofar as it is based upon rules or regulations of the National Association of Securities Dealers, Inc., is inapplicable to the plaintiffs: and insofar as it is based upon the law of New York either does not preclude recovery by plaintiffs, or else Faulkner is estopped by its conduct to invoke such defense; and Faulkner has sustained no damage by reason thereof.

(9) Pursuant to FRCP 56(a) and 56(b), granting plaintiffs Thomas J. Byrnes and Francis R. Santangelo summary judgment on their prayer for declaratory judgment, and on Faulkner's First Counterclaim for declaratory relief, that the said defenses asserted by Faulkner are insufficient in law and in fact, and awarding to plaintiffs their just damages or ordering an inquest of the amount of their damages.

10) Granting to the plaintiffs such other, further and different relief as to the Court may seem just and proper in the premises.

PLEASE TAKE FURTHER NOTICE, that pursuant to Rule 9(c)(2) of the General Rules of the United States District Court for the Southern District of New York, defendant is required to serve answering or opposing papers upon the undersigned on or before the 3rd day of April, 1975.

Plaintiffs' Notice of Motion for Summary Judgment

Dated: New York, New York
February 14, 1975

Yours, etc.

CARRO, SPANBOCK, LONDIN, RODMAN & FASS
Attorneys for plaintiffs and counter-claim defendants Thomas J. Byrnes and Francis R. Santangelo

By _____
A Member of the Firm
40 East 40th Street
New York, New York 10016
Tel. (212) 889-3600

Affidavit of George J. Solomon, Submitted in Support of Plaintiffs' Motion for Summary Judgment

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CAPTION OMITTED

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GEORGE J. SOLOMON, being duly sworn, deposes and says:

1. I am an attorney at law and a member of the New York City law firm of Poletti Freidin Prashker Feldman & Gartner, which firm acted as Special Counsel to White Shield Corporation ("White Shield" or "the Company") in connection with the Company's registration in 1971 with the Securities and Exchange Commission ("the Commission") under the Securities Act of 1933 of shares of White Shield owned and being offered by various selling shareholders of White Shield.

2. The shares to be offered were included in four Registration Statements filed with the Commission, as follows:

(a) Registration Statement No. 2-35904, originally filed with the Commission on December 31, 1969, was declared effective on January 22, 1971, "as of July 15, 1970." A post-effective amendment to that registration statement was declared effective on June 4, 1971, and registered 472,278 shares of common stock owned by F.O.F. Proprietary Funds, Ltd. and IIT, an International Investment Trust. This offering was not underwritten, and the stock was to be offered to the public "from time to time." The prospectus dated June 3, 1971, contained in the post-effective amendment to this registration statement is referred to herein as the "Base Prospectus", and was included in the "wrap-around" prospectus of each of the other registrations. A copy of the Base Prospectus contained in Registration Statement No. 2-35904, as amended, is annexed hereto and incorporated as Exhibit "1".

(b) Registration Statement No. 2-39346, originally filed with the Commission on February 3, 1971, was declared effective on June 4, 1971, and registered 559,000 shares of common stock, 259,000 of which were offered for sale by former shareholders of Automatic Toll Systems, Inc., which had been merged in 1969 into a wholly-owned subsidiary of White Shield, and 300,000 shares of which were offered by the Company. The prospectus of this registration statement was a "wrap-around" prospectus incorporating the Base Prospectus of Registration Statement No. 2-35904. A copy of the wrap-around prospectus of

Registration Statement No. 2-39346 is annexed hereto and incorporated as Exhibit "2". This offering was underwritten by Leason & Co. as managing underwriter for the several underwriters named therein.

(c) Registration Statement No. 2-40398, filed with the SEC on May 13, 1971, was declared effective on June 7, 1971, and registered 422,513 shares of common stock owned by approximately twenty-seven individuals, including shares then owned by Messrs. Thomas J. Byrnes and Francis R. Santangelo. This offering was not underwritten, and the stock was to be offered "from time to time" by individual selling shareholders through their brokers, on an "uncoordinated basis". The prospectus in Registration Statement No. 2-40398 was a "wrap-around" prospectus, incorporating the Base Prospectus of Registration Statement No. 2-35904. A copy of the wrap-around prospectus of Registration Statement No. 2-40398 is annexed hereto and incorporated herein as Exhibit "3".

(d) Registration statement No. 2-40397, filed with the SEC on May 13, 1971, was declared effective on June 14, 1971, and registered 850,000 shares of common stock which were not then outstanding, representing the maximum number of shares issuable upon the exchange of certain securities of White Shield Leasing Corp. This offering was not underwritten. The prospectus in Registration Statement No. 2-40397 was also a "wrap-around" prospectus incorporating the Base Prospectus of Registration Statement No. 2-35904. A copy of the wrap-around prospectus of Registration Statement No. 2-40397 is annexed hereto and incorporated herein as Exhibit "4".

3. Each selling shareholder whose shares were included in Registration Statement No. 2-40398 had entered into an agreement with the Company in the form of Exhibit "5" annexed hereto. Among other things, that agreement required each selling shareholder to furnish such information as the Company might be requested to furnish to the Commission concerning such selling shareholder.

4. On May 27, 1971, the Division of Corporation Finance of the Commission issued its "Letter of Comment" concerning Registration Statements Nos. 2-40397 and 2-40398. The Letter of Comment included the following statement:

> "The registrant should undertake to disclose the identity of any NASD members who transact dealings in more than 10% of the shares being registered by these two statements. Any such NASD members should be identified as underwriters in prospectuses used by the selling shareholders."

5. In response to the Letter of Comment, the Company filed an amendment to each of the above-referenced Registration Statements on June 3, 1971. The amended Registration Statements contained the following undertaking:

> "In addition to the undertakings heretofore made, registrant undertakes, based upon information furnished to it by the selling shareholders, from time to time as necessary after the effective date hereof, to amend or supplement the prospectus to identify as underwriters within the meaning of the Securities Act of 1933 any NASD members who participate in the sale of more than 10% of the shares being registered hereby and to furnish copies of such amended or supplemented prospectus to the selling shareholders."

6. In order to be in a position to fulfill the above-quoted undertaking to the Commission and based upon the agreement of each of the selling shareholders so to do, on June 3, 1971, I wrote to each of the selling shareholders under the above-referenced Registration Statements advising them that the Commission had requested and White Shield had agreed that the prospectuses applicable to these shares would from time to time, as necessary, be amended or supplemented to disclose the identity of any NASD broker-dealer who participates in the distribution of more than 10% of the shares covered by each of the Registration Statements and that any such broker-dealer would be described in the prospectus as so amended or supplemented as an underwriter within the meaning of the Securities Act of 1933. The letter advised the selling shareholders that they were, therefore, obliged to notify the Company promptly of the identity of each broker-dealer firm utilized in the sale of shares and of the number of shares such broker-dealer was requested to sell. A copy of this letter is annexed hereto and incorporated herein as Exhibit "6".

7. On or about June 15, 1971, I received from plaintiff Thomas J. Byrnes a letter dated June 14, 1971 reporting the sale through the brokerage firm of Tobey & Kirk on behalf of Messrs. Byrnes, Santangelo, Pedersen and Braddy of an aggregate of 144,000 shares of White Shield. The dealers to whom such shares were sold were set forth in that letter and included the defendants Faulkner, Dawkins & Sullivan and Singer & Mackie, Inc. A copy of said letter is annexed hereto and incorporated herein by reference as Exhibit "7".

8. On or about June 18, 1971, White Shield filed with the Commission and published a supplement to the prospectus dated June 7, 1971, relating to the shares included in Registration Statement No. 2-40398. The supplement read as follows:

"WHITE SHIELD CORPORATION

Supplement dated June 18, 1971 to Prospectus dated June 7, 1971

Page 4 PLAN OF DISTRIBUTION

By virtue of its acting as broker on behalf of Messrs. Thomas J. Byrnes, Vincent Draddy, Peer T. Pedersen and Francis R. Santangelo in connection with their sale of approximately 145,000 of the shares offered hereby, Tobey & Kirk, 52 Wall Street, New York, New York may be deemed an 'underwriter' as that term is defined in the Securities Act of 1933."

GEORGE J. SOLOMON

Sworn to before me this
10th day of February, 1975.

Helen J. Tarpey

Notary Public, State of New York
No. 24-[illegible]-675
Qualified in Kings County
Commission Expires March 30, 1976

PROSPECTUS

White Shield Corporation

472,278 Shares, Common Stock

(Par Value $.05 per Share)

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED ON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

The shares of Common Stock being offered hereby are being sold by certain shareholders of White Shield Corporation (the "Company"). See "Selling Shareholders". The Company will not receive any of the proceeds from such sales. The selling shareholders may be deemed to be "underwriters" with respect to the sale of the shares offered hereby as that term is defined in the Securities Act of 1933 (the "Act").

The shares of Common Stock offered hereby will be offered from time to time by the selling shareholders in the over-the-counter market.

While this offering is not being underwritten, the selling shareholders may use the assistance of members of the National Association of Securities Dealers, Inc. in connection with the sales of the securities offered hereby and may pay commissions not exceeding those permitted to such N.A.S.D. members for such assistance. See "Plan of Distribution". The Company and the selling shareholders respectively undertake to indemnify each other from such civil liabilities to the extent of the responsibility of each party for information in this Prospectus. Participating members of the N.A.S.D. may be deemed underwriters as that term is defined in the Act.

The proceeds to the selling shareholders will be the sale price less commission to be paid as above described. The Company's Common Stock is traded in the over-the-counter market. The bid price of such stock as reported by the National Quotation Bureau has ranged from $5¾ to $10⅝ during the quarter ended March 31, 1971, and from $10⅛ to $17 during the month of April 1971. On May 25, 1971 the stock was quoted $13⅝ bid, $13⅞ asked. See "Price Range of Common Stock."

The expenses in connection with the registration of the Common Stock offered hereby, estimated at $100,000 ($.21 per share), will be borne by the Company.

The Company incurred a net loss of $2,981,000 in 1970 and a net loss of $209,000 in the quarter ended March 31, 1971. See "Consolidated Statement of Income (Loss)" on page 6 hereof and the text commenting thereon following the notes to such statement appearing on page 9.

The Company has filed additional registration statements relating to the offering of additional shares of its common stock, which shares may be offered contemporaneously with the shares offered hereby. See "Capitalization".

The date of this Prospectus is June 3, 1971

REGISTRATION STATEMENT

This Prospectus does not contain all the information set forth in the Registration Statement, certain items of which are omitted, together with financial schedules and exhibits, as permitted by the Rules and Regulations of the Securities and Exchange Commission under the Securities Act of 1933. For further information with respect to the securities offered hereby and the Company, reference is made to the Registration Statement, including the financial schedules and exhibits filed as a part thereof. Except where otherwise indicated this Prospectus speaks as of its date, and neither the delivery hereof nor any sale made hereunder shall create an implication that the affairs of the Company have continued unchanged since the date hereof.

No dealer, salesman or any other person has been authorized to give any information or to make any representations other than those contained in this Prospectus in connection with the offer contained in this Prospectus and, if given or made, such information or representations must not be relied upon as having been authorized by the Company or by the Underwriter. This Prospectus does not constitute an offer or solicitation by the Company or by the Underwriter to any person in any jurisdiction in which such offer may not lawfully be made.

TABLE OF CONTENTS

	Page
Introduction	3
Price Range of Common Stock	4
Capitalization	5
Consolidated Statement of Income (Loss)	6
Business	10
Syndicated Drilling Programs	10
Fees and Overrides	13
Fixed Cost Contracts	13
Direct Drilling, Joint Ventures and Acquisition of Producing Properties	14
Oil Field Equipment and Supplies	18
Automatic Toll Systems	20
Other Activities	22
Exchanges	23
Personnel	24
Competition	24
Properties	24
Oil and Gas Property Interests	24
Other Property Interests	26
Management	27
Remuneration	29
Principal Stockholders	30
Selling Shareholders	31
Interest of Management and Others in Certain Transactions	32
Description of Capital Stock	34
Description of Options and Warrants	36
Plan of Distribution	41
Legal Opinions	41
Experts	41
Financial Statements	42

Until July 13, 1971 all dealers effecting transactions in the Common Stock, whether or not participating in this distribution, may be required to deliver a prospectus. This is in addition to the obligation of dealers to deliver a prospectus when acting as underwriters and with respect to their unsold allotments or subscriptions.

WHITE SHIELD CORPORATION

595 Madison Avenue
New York, New York 10022
212-758-1990

1601 So. Main Street
P. O. Box 2139
Tulsa, Oklahoma 74101
918-587-9421

INTRODUCTION

White Shield Corporation was incorporated under the laws of the State of New York on September 9, 1957. As hereinafter used, the term "Company" refers to White Shield Corporation and its subsidiaries, unless the context otherwise requires.

The Company, under a prior management, ceased all operations in 1962 and remained wholly inactive until March 1966 when it acquired all of the outstanding stock of White Shield Oil and Gas Corp. (hereinafter referred to as "Oil and Gas Corp."). Oil and Gas Corp. had no significant operations prior to its acquisition by the Company. In connection with the acquisition of Oil and Gas Corp., the Company was recapitalized, and the holders of Oil and Gas Corp. received 90% of the then total outstanding stock of the Company.

Since March 1966 the Company has been engaged principally in various phases of the oil and gas business. Such activities include the acquisition and drilling of oil and gas properties for its own account or as a joint venturer with others, the sponsorship and management of syndicated drilling programs, the furnishing of engineering services in connection with drilling and well operation, and the operation of gas gathering systems. From May 1968 until May 1971, when it sold all of the stock of its subsidiary Rodman Supply Company, the Company was also engaged in the sale of oil field equipment and supplies. The Company has acquired certain foreign oil and gas concessions, and participated as a joint venturer in the construction of a gas processing plant which commenced operations in July 1970. Through the merger of Automatic Toll Systems, Inc. ("ATS") into a subsidiary of the Company in October 1969, the Company is now also engaged in the manufacture, sale, maintenance and leasing of highway toll collecting equipment. See "Business".

The Company has engaged in a substantial number of transactions with its officers and directors and with companies with which they are affiliated. See "Interest of Management and Others in Certain Transactions."

To date, the Company's activities in the oil and gas field have been largely dependent upon the availability of capital supplied in part by other joint venturers or by participants in drilling programs which it sponsors. These programs are designed for investors with income subject to taxation in the higher federal income tax brackets. Because of the generally depressed economic climate in 1970 and because of the poor results of 1969 drilling activities in the Company's 100 Fund (See "Business—Syndicated Drilling Programs"), 1970 subscriptions to Company sponsored drilling programs were at a lower level than in 1969 and current subscriptions are substantially below both 1969 and 1970. Because of the above, the risks inherent in all drilling programs and the dependency of such programs upon continuing favorable Federal tax treatment, there can be no assurance as to the Company's continuing ability to attract investors to the programs it sponsors nor upon the amount of future income to be realized from such activities.

Primarily as a result of an additional provision of $2,600,000 made in the period for estimated losses, principally in connection with the proposed abandonment or other disposition of certain oil and gas properties and the reduction as of July 1, 1970 in estimated oil and gas reserves, the reduction in management fees and turnkey contracts resulting from a lower level of syndicated drilling program subscriptions and the charge off or write down to estimated realizable value of certain assets and deferred charges directly related to its drilling programs in anticipation of the reduced level of such activities, the Company reported a net loss of $2,981,000 for the year ended December 31, 1970 as compared to net income of $4,250,000 for the comparable 1969 period. During the first quarter of the current year, the Company incurred a net loss of $209,000 as compared to net income of $337,000 for the quarter ended March 31, 1970, principally due to decreases in drilling fund activity, decreases in

sales of oil field equipment and the additional provision for depreciation, depletion and amortization referred to in Note (j) to the Consolidated Statement of Income (Loss). (See "Consolidated Statement of Income (Loss)" and "Properties"). The reduction in estimated oil and gas reserves as of July 1, 1970 will have a continuing effect upon the future rate and amount of charges for depreciation, depletion and amortization of its presently owned producing properties. See Note (i) of "Notes to Consolidated Statement of Income (Loss)".

Based upon the Company's Consolidated Balance Sheet as of March 31, 1971, the 4,735,216 shares of Common Stock reported as outstanding on such date had a net tangible book value of $1.68 per share after deducting the redemption price of $20 per share of the 535,000 shares of preferred stock issued in connection with the acquisition of Automatic Toll Systems (see "Business—Automatic Toll Systems"). In addition, the Company has a contingent obligation to issue a presently indeterminate number (not in excess of a total of 1,325,000) of additional shares of its Common Stock, without receipt of any additional consideration, to former shareholders of Automatic Toll Systems, Inc., and to issue up to a maximum of 850,000 shares of its Common Stock in exchange for certain securities of White Shield Leasing Corporation. See "Business—Oil Field Equipment and Supplies and Automatic Toll Systems" and "Description of Options and Warrants."

On March 31, 1971, the Company also had outstanding warrants and options and agreements under which the issuance of additional warrants had been earned, for the purchase of an aggregate of an additional 373,300 shares of Common Stock at varying prices, portions of which are not immediately exercisable. See "Description of Options and Warrants". For the life of such warrants and options the holders thereof are given the opportunity to profit from a rise in the market for the Common Stock, with a resulting dilution in the interest of the holders of Common Stock. The terms on which the Company may obtain additional capital during the exercise periods may be adversely affected. The holders of the options and warrants may be expected to exercise them at times when the Company would, in all likelihood, be able to obtain new capital on terms far more favorable than those provided for by the options and warrants.

PRICE RANGE OF COMMON STOCK

The range of the high and low bid and asked prices for the Company's Common Stock for the period since January 1969, as reported by the National Quotation Bureau, and as adjusted to reflect a 2 for 1 stock split in July 1969, is set forth in the following table:

	Bid		Asked	
	High	Low	High	Low
1969:				
First Quarter	24	16	25½	17
Second Quarter	24½	16¼	25	16½
Third Quarter	28	17	28½	17½
Fourth Quarter	23½	16¼	24	16½
1970:				
First Quarter	17½	11	17¾	11¼
Second Quarter	12	5	12¾	5⅛
Third Quarter	8⅜	2¾	8¾	3⅛
Fourth Quarter	7⅞	4	9	4½
1971:				
First Quarter	10⅝	5¾	10⅞	6
Month of April	17	10⅛	17⅜	10⅝

On May 25, 1971 the stock was quoted at $13⅝ bid and $13⅞ asked. The prices stated are those quoted by the over-the-counter dealers to each other and do not include retail markup, markdown or commission.

CAPITALIZATION

The capitalization of the Company and subsidiaries at March 31, 1971 was as follows:

	Authorized	Outstanding at March 31, 1971
Long-term debt (including $5,231,000 due within one year) (1):		
Notes payable—banks		$ 6,107,000
Notes payable—others		9,116,000
Total		$15,223,000
Minority interest in subsidiaries (2)		$ 2,305,000
Stockholders' equity:		
Preferred stock, $1 par value	1,000,000 shs.	
Outstanding:		
Series A		380,500 shs.
Series B		154,500 shs.
Common stock, 5¢ par value	6,000,000 shs. (3) (4)	
Outstanding		4,735,216 shs. (5)

(1) See Note 9 of Notes to Financial Statements.

(2) See Notes 1 and 10 of Notes to Financial Statements.

(3) See Notes 10 and 11 of Notes to Financial Statements for shares reserved for conversion of Preferred Stock and for shares issuable upon exercise of warrants and options, including those authorized by subsidiary companies, and see "Business—Oil Field Equipment and Supplies and Automatic Toll Systems" for shares issuable and contingently issuable based upon agreements as amended in December 1970.

(4) Subject to stockholders' approval, the Company intends to amend its Certificate of Incorporation to increase the number of authorized shares of common stock to 7,500,000 shares.

(5) The Company has filed registration statements covering approximately 2,150,000 shares in addition to the shares offered hereby. Of these, 850,000 shares (not presently outstanding) represent the maximum number of shares issuable upon the exchange of certain securities of White Shield Leasing Corporation (see "Business—Oil Field Equipment and Supplies"); 888,200 shares (800,000 not presently outstanding and 88,200 already issued) represent the maximum number of shares presently issuable to and which may be offered by the former ATS shareholders (see "Business—Automatic Toll Systems"); and the balance (already issued) represent shares to be offered by various selling shareholders. Based upon present market price, the Company will be required to issue only a portion of the additional 800,000 shares to the former ATS shareholders, and if the amount so to be issued is less than 500,000 shares, as is presently contemplated, the Company will offer 300,000 shares for its own account.

(6) See Note 13 of Notes to Financial Statements for obligations under long-term leases.

Ex 2.

PROSPECTUS

White Shield Corporation

559,000 Shares of Common Stock

(Par Value $.05 per Share)

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION, NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

Of the 559,000 shares offered hereby, 259,000 are being offered for the account of certain Shareholders of White Shield Corporation (the "Company") and 300,000 are being offered for the account of the Company. See "Selling Shareholders" and "Underwriting."

	Price to Public(1)	Underwriting Discounts and Commissions(2)(3)	Proceeds to Company(4)	Proceeds to Selling Stockholders
Per Share of Common Stock	$11.50	$1.10 - $1.13	$10.37	$10.40
Total	$6,428,500	$624,900	$3,110,000	$2,693,600

(1) See "Price Range of Common Stock" in the Base Prospectus for information with respect to the price range of the Company's Common Stock in the over-the-counter market.

(2) The shares offered hereby will be offered on a best efforts "all or none" basis. If all of the shares are not sold within 30 days of the date hereof the offering by the Underwriters will be terminated and all amounts received will be returned in full without interest or deduction for expenses. The Underwriters have made no firm commitment and are under no obligation to purchase the shares unless all of the shares are sold. The proceeds of all sales will be deposited by the underwriters in an escrow account at Continental Illinois National Bank and Trust Company of Chicago pending the sale of all of the shares offered hereby. See "Underwriting."

(3) Includes $614,900 ($1.10 per share) cash commission or discount and $10,000 ($.03 per share offered by the Company) for expenses of the Underwriters and their counsel. The Company has agreed to indemnify the Underwriters and the Selling Shareholders against certain civil liabilities, including liabilities under the Securities Act of 1933.

(4) Before deduction of expenses in connection with the registration of the Common Stock offered hereby, estimated at $40,000 ($.13 per share offered by the Company), all of which expenses will be borne by the Company.

There is included as part of this Prospectus a Prospectus of the Company dated June 3, 1971 (the "Base Prospectus") relating to an offering by certain other Selling Shareholders of 472,278 shares of Common Stock. Those shares are not being underwritten but may be offered from time to time in the over-the-counter market contemporaneously with the shares being offered hereby. Those Selling Shareholders may use the assistance of members of the National Association of Securities Dealers in connection with the sale of the shares being offered by them and may pay commissions not exceeding those permitted to such NASD members for such assistance. Pages 1 to 7 of this Supplement contain certain information which either supplements or supersedes information set forth in the Base Prospectus; all other portions of the Base Prospectus being incorporated herein by reference.

The Company incurred a net loss of $2,981,000 in 1970 and a net loss of $209,000 in the quarter ended March 31, 1971. See "Consolidated Statement of Income (Loss)" on page 6 of the Base Prospectus and the text commenting thereon following the notes to such statement appearing on page 9 of the Base Prospectus.

Leason & Co., Inc.

39 S. LaSalle Street
Chicago, Illinois 60603

The date of this Prospectus is June 4, 1971

Exhibit "2"---Leason Wrap-around Prospectus

Until July 14, 1971 all dealers effecting transactions in the Common Stock, whether or not participating in this distribution, may be required to deliver a prospectus. This is in addition to the obligation of dealers to deliver a prospectus when acting as underwriters and with respect to their unsold allotments or subscriptions.

TABLE OF CONTENTS

In the Supplement

	Page
Capitalization	3
Use of Proceeds	3
Selling Shareholders	4
Underwriting	6
Legal Opinions	7

In the Base Prospectus

	Page
Introduction	3
Price Range of Common Stock	4
Capitalization	5
Consolidated Statement of Income (Loss)	6
Business	10
Syndicated Drilling Programs	10
Fees and Overrides	13
Fixed Cost Contracts	13
Direct Drilling, Joint Ventures and Acquisition of Producing Properties	14
Oil Field Equipment and Supplies	18
Automatic Toll Systems	20
Other Activities	22
Exchanges	23
Personnel	24
Competition	24
Properties	24
Oil and Gas Property Interests	24
Other Property Interests	26
Management	27
Remuneration	29
Principal Stockholders	30
Selling Shareholders	31
Interest of Management and Others in Certain Transactions	32
Description of Capital Stock	34
Description of Options and Warrants	36
Plan of Distribution	41
Legal Opinions	41
Experts	41
Financial Statements	42

The shares offered by the Underwriters named herein are offered subject to receipt and acceptance by them and subject to the right to reject any order in whole or in part and certain other conditions.

IN CONNECTION WITH THIS OFFERING, THE UNDERWRITERS MAY OVER-ALLOT OR EFFECT TRANSACTIONS WHICH STABILIZE OR MAINTAIN THE MARKET PRICE OF THE COMPANY'S COMMON STOCK AT A LEVEL ABOVE THAT WHICH MIGHT OTHERWISE PREVAIL IN THE OPEN MARKET. SUCH STABILIZING, IF COMMENCED, MAY BE DISCONTINUED AT ANY TIME.

CAPITALIZATION

(Supplementing material appearing on page 5 of the Base Prospectus)

The capitalization of the Company and subsidiaries at March 31, 1971, and as adjusted to give effect to the issuance and sale of the shares offered hereby, is as follows:

	Authorized	Outstanding at March 31, 1971	Amount to be Outstanding at Completion of Offering
Long-term debt (including $5,231,000 due within one year)(1):			
Notes payable—banks		$ 6,107,000	$ 6,107,000
Notes payable—others		9,116,000	9,116,000
Total		$ 15,223,000	$ 15,223,000
Minority interest in subsidiaries (2)		$ 2,305,000	$ 2,305,000
Stockholders' equity:			
Preferred stock, $1 par value	1,000,000 shs.		
Outstanding:			
Series A		380,500 shs.	380,500 shs.
Series B		154,500 shs.	154,500 shs.
Common stock, 5¢ par value	6,000,000 shs.(3)(4)		
Outstanding		4,735,216 shs.(5)	5,206,016 shs.(6)

(1) See Note 9 of Notes to Financial Statements.
(2) See Notes 1 and 10 of Notes to Financial Statements.
(3) See Notes 10 and 11 of Notes to Financial Statements for shares reserved for conversion of Preferred Stock and for shares issuable upon exercise of warrants and options, including those authorized by subsidiary companies. See "Selling Shareholders" herein for a description of the additional shares contingently issuable to such shareholders.
(4) Subject to stockholders' approval, the Company intends to amend its Certificate of Incorporation to increase the number of authorized shares of common stock to 7,500,000 shares.
(5) The Company has filed registration statements covering approximately 1,745,000 shares in addition to the shares offered hereby. Of this, 472,278 shares (already issued) are included in the Base Prospectus; 650,000 shares (not presently outstanding) represent the maximum number of shares issuable upon the exchange of certain securities of White Shield Leasing Corporation (see "Business—Oil Field Equipment and Supplies" in Base Prospectus); and the balance (already issued) represent shares to be offered by various selling shareholders.
(6) Includes the 170,800 additional shares presently issuable to the selling shareholders herein and 300,000 shares to be sold for the account of the Company.
(7) See Note 13 of Notes to Financial Statements for obligations under long-term leases.

USE OF PROCEEDS

The net proceeds to the Company from the sale of the 300,000 shares offered for its account hereunder will be approximately $3,070,000 after deduction of the underwriting commissions and the estimated expenses of the offering. The Company will receive no part of the proceeds of the shares being issued to and offered by the Selling Shareholders.

At March 31, 1971 the Company had consolidated current liabilities of $16,025,000 and consolidated current assets of $16,255,000 resulting in net working capital of only slightly in excess of $200,000. In addition, on that date two of the Company's subsidiaries had a combined deficiency in the level of working capital required under loan agreements. (See pages 20 and 45 of Base Prospectus.) The Company intends to utilize the net proceeds from the shares being offered for its account for working capital including advances, estimated at $1,350,000, to subsidiaries requiring additional working capital under the terms of their loan agreements. Management is of the opinion that additional working capital is required to provide necessary liquidity, to meet contingencies and to preserve the Company's credit standing. The Company intends to retain the proceeds pending expenditure for any such purposes in cash and cash items and short term instruments.

The availability of such additional funds will also permit the Company to continue to acquire additional oil and gas properties and continue to participate in the exploitation and exploration of properties in which it has interests, including further participation in the Indonesian Production Sharing Contract. (See "Business—Direct Drilling, Joint Ventures and Acquisition of Producing Properties.")

SELLING SHAREHOLDERS

(Superseding material appearing on page 31 of the Base Prospectus)

The Selling Shareholders, all of whom were shareholders of Automatic Toll Systems, Inc. ("ATS") prior to its merger into a subsidiary of the Company in October 1969, received upon the merger an aggregate of 412,000 shares of Common Stock, 308,500 shares of Series A and 154,500 shares of Series B Senior Cumulative Convertible Voting Preferred Stock of the Company. 200,000 shares of the Series A and 150,000 shares of the Series B Preferred Stock were placed in escrow to be released based upon the pre-tax profits of ATS. Based upon the amount of such profits for the two years ended December 31, 1970, 178,309 shares of Series A Preferred Stock have been released from escrow. (See "Business—Automatic Toll Systems, Inc." in Base Prospectus.)

Under the terms of the Merger Agreement 225,000 of the shares of Common Stock initially issued to the former ATS shareholders were designated as Group A shares and 175,000 of such shares were designated as Group B shares. The Company obligated itself, to issue to the former ATS shareholders such number of additional shares of its Common Stock as would be necessary to permit them to realize net proceeds of $4,500,000 from the sale of Group A shares, and such number of additional shares, up to a maximum of 525,000 shares, as would be necessary to permit them to realize gross proceeds of $3,500,000 from the sale of the Group B shares. In December 1970 the Agreement was amended to provide that the Company would in no event be required to issue more than an additional 800,000 shares of its Common Stock so as to permit the former ATS shareholders to realize net proceeds of $4,500,000 from the sale of the Group A shares. (See "Business—Automatic Toll Systems, Inc." in Base Prospectus.)

The former ATS shareholders have heretofore sold 136,800 of the 225,000 Group A shares from which they have realized net proceeds of $1,807,125. There is being offered for their account hereunder the remaining 88,200 Group A shares plus the 170,800 additional shares which the Company will be required to issue to them so as to permit them, under the terms of the Underwriting Agreement, to realize additional net proceeds of $2,692,875.

The identity of the Selling Shareholders, the number of shares of the Company presently owned by them, the number of such shares being offered for their account hereunder and the number of shares to be retained by each are as follows:

Name	Number of Shares Owned			Number of Shares Being Offered*	Number of Shares to be Retained		
	Common Stock	Series A Preferred	Series B Preferred	Common Stock	Common Stock**	Series A Preferred	Series B Preferred
Lewis M. Schott 250 Park Avenue New York, New York(1)	164,009	169,019	68,629	80,945	83,064	169,019	68,629
Marcia Whitney Schott 778 Park Avenue New York, New York(1)	15,024	28,652	11,633	942	14,082	28,652	11,633
Marcia Whitney Schott f/b/o Victoria Lou Schott 778 Park Avenue New York, New York(1)	17,773	32,114	13,040	1,990	15,783	32,114	13,040
Marcia Whitney Schott f/b/o Steven Gorin Schott 778 Park Avenue New York, New York(1)	17,773	32,114	13,040	1,990	15,783	32,114	13,040

Marcia Whitney Schott f/b/o Nash Whitney Schott 778 Park Avenue New York, New York(1)	17,773	32,114	13,040	1,990	15,783	32,114	13,040
Nathan Raybin 570 Seventh Avenue New York, New York	4,373	8,657	3,515	130	4,243	8,657	3,515
Herman Lopata Automatic Toll Systems, Inc. 3920 Merritt Avenue Bronx, New York	18,998	34,587	14,044	—***	18,998	34,587	14,044
Sidney P. Kriser 211 East 43rd Street New York, New York	6,090	12,366	5,021	13	6,077	12,366	5,021
Benjamin Messinger 570 Seventh Avenue New York, New York	4,464	8,656	3,515	200	4,264	8,656	3,515

* Does not include the 170,800 additional shares to be issued by the Company, the sale of which, under the terms of the Underwriting Agreement, will permit the selling shareholders to realize additional net proceeds of $2,692,875 from the shares offered hereby.

** Under the terms of the Merger Agreement and the supplemental agreements thereto, the Company may be required to issue up to an additional 525,000 shares of its Common Stock if between February 1972 and June 1973 the gross proceeds from the sale of the 175,000 Group B shares of Common Stock initially issued to the former ATS shareholders, including the selling shareholders, shall aggregate less than $3,500,000. See "Business—Automatic Toll Systems, Inc." in Base Prospectus.

*** Mr. Lopata has heretofore sold all of the Group A shares initially issued to him. Since he will receive a portion of the proceeds from the sale of the Group A shares (including the additional shares to be issued) he is included as a selling shareholder herein.

(1) Mr. Schott has disclaimed any beneficial interest in the shares owned by Mrs. Schott and in the shares held in trust for their children. Mrs. Schott has also disclaimed any beneficial interest in the shares owned by Mr. Schott and in the trusts for their children.

The selling shareholders have entered into a Deposit and Distribution Agreement pursuant to which all of the selling shareholders have deposited with Lewis M. Schott, as agent, the 88,200 of the 225,000 shares of Common Stock, initially issued to them and not heretofore sold. They have also designated Mr. Schott as the agent to receive the additional shares which the Company may be required to issue to them. Mr. Schott has been authorized to sell the shares on behalf of all the selling shareholders and to enter into the Underwriting Agreement on their behalf. The net proceeds from the sale of the shares being offered for their account ($2,692,875) shall be apportioned among the several selling shareholders as follows:

Name	Percentage
Lewis M. Schott	65.85%
Marcia Schott	3.81
Marcia Schott f/b/o Nash Whitney Schott	8.48
Marcia Schott f/b/o Victoria Lou Schott	8.48
Marcia Schott f/b/o Steven Gorin Schott	8.43
Nathan Raybin	.31
Herman Lopata	.96
Sidney P. Kriser	3.66
Benjamin Messinger	.02

UNDERWRITING

(Superseding Material Appearing on Page 41 of the Base Prospectus)

Subject to the terms and conditions set forth in the Underwriting Agreement the Company and the Selling Shareholders have agreed to sell to each of the Underwriters named below and each of the Underwriters, for whom Leason & Co., Inc. is acting as Managing Underwriter, has severally agreed to use its best efforts to sell on an all-or-none basis, and if sold, to purchase from the Company and the Selling Shareholders all of the shares offered hereunder within 30 days after the date of this Prospectus. Pending the sale of all of the shares offered hereby, the proceeds of all sales will be deposited by the underwriters in an escrow account at Continental Illinois National Bank and Trust Company of Chicago. If all of the shares offered hereby are not sold within such 30 day period the bank will return the proceeds deposited with it by the underwriters to subscribers without interest and without deduction or charges therefrom.

Name	Address	Number of Shares of Stock to be Purchased From: The Company	Number of Shares of Stock to be Purchased From: The Selling Shareholder
Leason & Co., Inc.	39 S. LaSalle Street Chicago, Illinois 60603	163,148	140,852
California Investors, Incorporated	3700 Wilshire Boulevard Los Angeles, California 90010	53,667	46,333
Smith, Hague & Company	Penobscot Building Detroit, Michigan 48226	48,301	41,699
Roberts, Scott & Co., Inc.	24th floor First National Bank Building San Diego, California 92112	34,884	30,116
	Total	300,000	259,000

The Company has been advised by the Managing Underwriter that the shares will be offered by the Underwriters for sale at the price set forth on the cover page hereof, or at such price less a concession not exceeding 80¢ per share on sales to selected dealers. The Underwriters may allow, and such dealers may re-allow a concession of not exceeding 12½¢ per share to other dealers.

The Company has agreed to indemnify the Underwriters against certain liabilities including liabilities under the Securities Act of 1933, as amended.

The Underwriting Agreement provides that the Company will pay all of the costs and expenses in connection with the registration of the shares offered hereby and that it will reimburse the Managing Underwriter for the fees of its counsel and for investigative expenses, for which the Managing Underwriter need not account, in the aggregate amount of $10,000, up to one-half of which amount shall be payable in the event the underwriting is abandoned or not completed.

LEGAL OPINIONS

(Supplementing Material Appearing on Page 41 of the Base Prospectus)

Legal matters in connection with the securities offered hereby will be passed upon for the Selling Shareholders by Messrs. Shea Gallop Climenko & Gould, New York, N. Y. and for the Underwriters by Lawrence A. Coles, Jr., Ltd., a professional corporation, Chicago, Illinois.

On March 31, 1971 partners in the firm of Shea Gallop Climenko & Gould owned 1,000 shares of the Common Stock of the Company. No shares of the Company are owned by the firm of Lawrence A. Coles, Jr., Ltd. professional corporation.

PROSPECTUS

White Shield Corporation

472,278 Shares, Common Stock

(Par Value $.05 per Share)

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED ON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

The shares of Common Stock being offered hereby are being sold by certain shareholders of White Shield Corporation (the "Company"). See "Selling Shareholders". The Company will not receive any of the proceeds from such sales. The selling shareholders may be deemed to be "underwriters" with respect to the sale of the shares offered hereby as that term is defined in the Securities Act of 1933 (the "Act").

The shares of Common Stock offered hereby will be offered from time to time by the selling shareholders in the over-the-counter market.

While this offering is not being underwritten, the selling shareholders may use the assistance of members of the National Association of Securities Dealers, Inc. in connection with the sales of the securities offered hereby and may pay commissions not exceeding those permitted to such N.A.S.D. members for such assistance. See "Plan of Distribution". The Company and the selling shareholders respectively undertake to indemnify each other from such civil liabilities to the extent of the responsibility of each party for information in this Prospectus. Participating members of the N.A.S.D. may be deemed underwriters as that term is defined in the Act.

The proceeds to the selling shareholders will be the sale price less commission to be paid as above described. The Company's Common Stock is traded in the over-the-counter market. The bid price of such stock as reported by the National Quotation Bureau has ranged from $5¾ to $10⅝ during the quarter ended March 31, 1971, and from $10⅛ to $17 during the month of April 1971. On May 25, 1971 the stock was quoted $13⅝ bid, $13⅞ asked. See "Price Range of Common Stock."

The expenses in connection with the registration of the Common Stock offered hereby, estimated at $100,000 ($.21 per share), will be borne by the Company.

The Company incurred a net loss of $2,981,000 in 1970 and a net loss of $209,000 in the quarter ended March 31, 1971. See "Consolidated Statement of Income (Loss)" on page 6 hereof and the text commenting thereon following the notes to such statement appearing on page 9.

The Company has filed additional registration statements relating to the offering of additional shares of its common stock, which shares may be offered contemporaneously with the shares offered hereby. See "Capitalization".

The date of this Prospectus is June 3, 1971

Cover of Base Prospectus---See Exhibit "1"

PROSPECTUS

White Shield Corporation

422,513 Shares, Common Stock
(Par Value $.05 per Share)

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED ON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

The shares of Common Stock being offered hereby are being sold by certain shareholders of White Shield Corporation (the "Company"). See "Selling Shareholders". The Company will not receive any of the proceeds from such sales. The selling shareholders may be deemed to be "underwriters" with respect to the sale of the shares offered hereby as that term is defined in the Securities Act of 1933 (the "Act").

The shares of Common Stock offered hereby will be offered from time to time by the selling shareholders in the over-the-counter market.

While this offering is not being underwritten, the selling shareholders may use the assistance of members of the National Association of Securities Dealers, Inc. in connection with the sales of the securities offered hereby and may pay commissions not exceeding those permitted to such N.A.S.D. members for such assistance. See "Plan of Distribution". The Company and the selling shareholders respectively undertake to indemnify each other from such civil liabilities to the extent of the responsibility of each party for information in this Prospectus. Participating members of the N.A.S.D. may be deemed underwriters as that term is defined in the Act.

The proceeds to the selling shareholders will be the sale price less commission to be paid as above described. The Company's Common Stock is traded in the over-the-counter market. The bid price of such stock as reported by the National Quotation Bureau has ranged from $5¾ to $10⅝ during the quarter ended March 31, 1971, and from $10⅝ to $17 during the month of April, 1971. On May 25, 1971 the stock was quoted at $13⅝ bid, $13⅞ asked. See "Price Range of Common Stock".

The expenses in connection with the registration of the Common Stock offered hereby, estimated at $20,000 ($.05 per share), will be borne by the Company.

The Company has filed additional registration statements relating to the offering of additional shares of its Common Stock, which shares may be offered contemporaneously with the shares offered hereby. See "Capitalization".

There is included as part of this Prospectus a Prospectus of the Company dated June 3, 1971 (the "Base Prospectus") relating to an offering by certain other Selling Shareholders of 472,278 shares of Common Stock, which shares may be offered contemporaneously with the shares being offered hereby. This Supplement contains certain information which either supplements or supersedes information set forth in the Base Prospectus; all other portions of the Base Prospectus being incorporated herein by reference.

The Company incurred a net loss of $2,981,000 in 1970 and a net loss of $209,000 in the quarter ended March 31, 1971. See "Consolidated Statement of Income (Loss)" on page 6 of the Base Prospectus and the text commenting thereon following the notes to such statement appearing on page 9 of the Base Prospectus.

The date of this Prospectus is June 7, 1971

SELLING SHAREHOLDERS

The 422,513 shares offered hereby for the account of the selling shareholders are being offered by the following:

	Number of Shares of Common Stock Owned	Number of Shares Offered Hereby	Number of Shares to Be Retained
Donald T. Beldock (1)	303,100	50,000	253,100
Thomas J. Byrnes (2)	68,400	68,400	—
Vincent Draddy (2)	24,000	24,000	—
Ralph Glendinning (4)	32,000	32,000	—
Harold Horn (1)	1,000	1,000	—
Russell Knapp (3)	21,690	20,000	1,690
William L. Kostelecky	1,198	734	464
Stephen Mann (1)(3)	10,000	10,000	—
Frank A. Marshall	10,000	10,000	—
Shornden D. McCloud	63,800	21,300	42,500
I. A. McNab	10,626	6,363	4,263
Arvid E. Olson, Jr. (5)	6,754	3,300	3,454
Peer T. Pedersen (2)	9,042	4,000	5,042
Joy S. Prince	900	500	400
Alan C. Reid, Jr.	2,000	2,000	—
Francis R. Santangelo (2)	82,400	51,600	30,800
Michael R. Santangelo (2)	24,000	12,000	12,000
P. David Searles (4)	23,334	13,334	10,000
Marvin Segal	10,000	10,000	—
Robert Spellman (6)	2,220	2,000	220
Theodore R. Stanley (4)	3,200	3,200	—
W. R. Sutton	6,626	6,626	—
Jack Vandervort	27,715	9,250	18,465
Chester H. Westfall, Jr.	5,000	5,000	—
John Winter (1)	369,600	50,000	319,600(7)
Terry Wolfenden	24,300	5,706	18,594
Willis R. Yarbrough	300	200	100

(1) Director or officer of the Company.

(2) Portions of the shares held by these individuals are in the record name of Byrnesan Associates of which Thomas Byrnes and Francis Santangelo are the partners. The beneficial interest in a portion

of the securities held by the partnership has been transferred to Messrs. Pedersen, Draddy and Michael Santangelo.

(3) Members of the firm of Javits Trubin Sillcocks & Edelman, general counsel to the Company. See "Interest of Management and Others in Certain Transactions" in Base Prospectus.

(4) Messrs. Glendinning, Searles and Stanley are members of the Glendinning Investors (see "Interest of Management and Others in Certain Transactions" in Base Prospectus). Messrs. Glendinning and Stanley hold options for the purchase of an additional 34,666 and 3,466 shares respectively.

(5) Includes 2,508 shares owned of record by Mrs. Olson for herself and as custodian for a child and 722 shares in the record name of Mr. Olson of which Mrs. Olson is the beneficial owner.

(6) Includes 220 shares held as trustee or custodian.

(7) Does not include 1,600 shares owned by Mr. Winter's children.

The selling shareholders acquired the shares being offered hereby from the Company or from other shareholders in transactions not registered under the Securities Act of 1933. They may be deemed underwriters for purposes of such Act, with respect to the shares being offered by them hereunder.

PLAN OF DISTRIBUTION

The shares of Common Stock offered hereby will be offered from time to time by the selling shareholders in the over-the-counter market, and at negotiated prices to institutional purchasers and to purchasers of blocks of 5,000 shares or more.

The selling shareholders may pay regular brokerage commissions not exceeding those permitted to members of the National Association of Securities Dealers, Inc. who render assistance to them in connection with the sale of the shares offered hereby. The selling shareholders and such participating members of the National Association of Securities Dealers, Inc. may be deemed to be underwriters as that term is defined in the Securities Act of 1933. The selling shareholders have agreed to indemnify the Company from civil liabilities under the Securities Act of 1933 arising out of the use of this Prospectus as such liability may relate to information included herein furnished by the selling shareholders.

The Company has agreed to pay all of the expenses (not including commissions) in connection with the registration of the shares offered hereby and has agreed to indemnify the selling shareholders from civil liabilities under the Securities Act of 1933 arising out of the use of this Prospectus except insofar as such liability may relate to information included herein furnished by the selling shareholders.

The Company has filed additional Registration Statements relating to the offering of shares of its Common Stock for its account and by other selling shareholders, which shares may be offered contemporaneously with the shares offered hereby. See "Capitalization" in Base Prospectus.

PROSPECTUS

White Shield C -poration

472,278 Shares, Common Stock

(Par Value $.05 per Share)

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED ON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

The shares of Common Stock being offered hereby are being sold by certain shareholders of White Shield Corporation (the "Company"). See "Selling Shareholders". The Company will not receive any of the proceeds from such sales. The selling shareholders may be deemed to be "underwriters" with respect to the sale of the shares offered hereby as that term is defined in the Securities Act of 1933 (the "Act").

The shares of Common Stock offered hereby will be offered from time to time by the selling shareholders in the over-the-counter market.

While this offering is not being underwritten, the selling shareholders may use the assistance of members of the National Association of Securities Dealers, Inc. in connection with the sales of the securities offered hereby and may pay commissions not exceeding those permitted to such N.A.S.D. members for such assistance. See "Plan of Distribution". The Company and the selling shareholders respectively undertake to indemnify each other from such civil liabilities to the extent of the responsibility of each party for information in this Prospectus. Participating members of the N.A.S.D. may be deemed underwriters as that term is defined in the Act.

The proceeds to the selling shareholders will be the sale price less commission to be paid as above described. The Company's Common Stock is traded in the over-the-counter market. The bid price of such stock as reported by the National Quotation Bureau has ranged from $5¾ to $10⅝ during the quarter ended March 31, 1971, and from $10⅜ to $17 during the month of April 1971. On May 25, 1971 the stock was quoted $13⅝ bid, $13⅞ asked. See "Price Range of Common Stock."

The expenses in connection with the registration of the Common Stock offered hereby, estimated at $100,000 ($.21 per share), will be borne by the Company.

The Company incurred a net loss of $2,981,000 in 1970 and a net loss of $209,000 in the quarter ended March 31, 1971. See "Consolidated Statement of Income (Loss)" on page 6 hereof and the text commenting thereon following the notes to such statement appearing on page 9.

The Company has filed additional registration statements relating to the offering of additional shares of its common stock, which shares may be offered contemporaneously with the shares offered hereby. See "Capitalization".

The date of this Prospectus is June 3, 1971

Cover of Base Prospectus---See Exhibit "1"

E-4

PROSPECTUS

White Shield Corporation

850,000 Shares of Common Stock

(Par Value $.05 per Share)

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION, NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

The shares of Common Stock offered hereby are the maximum number of shares issuable by White Shield Corporation (the "Company") upon exercise of certain rights which it granted to the holders of $5,000,000 face amount of Subordinated Convertible Debentures and $1,000,000 principal amount of Notes of its subsidiary White Shield Leasing Corporation (the "Convertible Securities") to exchange such securities for shares of the Company. The exchange right expires on December 31, 1975. Until June 30, 1972 the Convertible Securities are exchangeable by the holders pro rata into shares of Common Stock of the Company at $6.50 per share, between July 1, 1972 and December 31, 1973 at $7.50 per share and from January 1, 1974 until December 31, 1975 at $8.50 per share. (See "Selling Security Holders".)

The shares of Common Stock of the Company may be reoffered by the exchanging security holders from time to time in the over-the-counter market. The exchanging security holders reoffering such shares may be deemed to be "underwriters" as such term is defined in the Securities Act of 1933. The exchanging security holders may use the assistance of members of the National Association of Securities Dealers, Inc. in connection with the resale of the shares offered hereby and may pay commissions not exceeding those permitted to such NASD members for such assistance. The Company and the exchanging security holders respectively have undertaken to indemnify each other from certain civil liabilities to the extent of the responsibility of each party for information in this Prospectus. Participating members of the NASD may be deemed underwriters as that term is defined in the Act. (See "Plan of Distribution".)

The proceeds to the exchanging security holders will be the sale price less commissions to be paid as above described. The Company's Common Stock is traded in the over-the-counter market. The bid price of such stock as reported by the National Quotation Bureau has ranged from $5¾ to $10⅝ during the quarter ended March 31, 1971, and from $10⅝ to $17 during the month of April 1971. On May 25. 1971, the stock was quoted $13⅝ bid and $13⅞ asked. (See "Price Range of Common Stock".)

The expense in connection with the registration of the Common Stock offered hereby, estimated at $25,000 ($.03 per share), will be borne by the Company.

There is included as part of this Prospectus a Prospectus of the Company dated June 3, 1971 (the "Base Prospectus") relating to an offering by certain other Selling Shareholders of 472,278 shares of Common Stock, which shares may be offered contemporaneously with the shares being offered hereby. This Supplement contains certain information which either supplements or supersedes information set forth in the Base Prospectus; all other portions of the Base Prospectus being incorporated herein by reference. The Company has filed other registration statements relating to the offering by it and other selling shareholders of additional shares of its Common Stock which shares may also be offered contemporaneously with the shares offered hereby. See "Capitalization".

The Company incurred a net loss of $2,981,000 in 1970 and a net loss of $209,000 in the quarter ended March 31, 1971. See "Consolidated Statement of Income (Loss)" on page 6 of the Base Prospectus and the text commenting thereon following the notes to such statement appearing on page 9 of the Base Prospectus.

The date of this Prospectus is June 14, 1971

Until July 26, 1971 (40 days after the commencement of this public offering) all dealers effecting transactions in the Common Stock, whether or not participating in this distribution, may be required to deliver a prospectus. This is in addition to the obligation of dealers to deliver a prospectus when acting as underwriters and with respect to their unsold allotments or subscriptions.

TABLE OF CONTENTS

	Page
In the Supplement	
Capitalization	3
Use of Proceeds	4
Management	4
Selling Security Holders	5
Description of Capital Stock	9
Description of Options and Warrants	9
Plan of Distribution	9

	Page
In the Base Prospectus	
Introduction	3
Price Range of Common Stock	4
Capitalization	5
Consolidated Statement of Income (Loss)	6
Business	10
Syndicated Drilling Programs	10
Fees and Overrides	13
Fixed Cost Contracts	13
Direct Drilling, Joint Ventures and Acquisition of Producing Properties	14
Oil Field Equipment and Supplies	18
Automatic Toll Systems	20
Other Activities	22
Exchanges	23
Personnel	24
Competition	24
Properties	24
Oil and Gas Property Interests	24
Other Property Interests	26
Management	27
Remuneration	29
Principal Stockholders	30
Selling Shareholders	31
Interest of Management and Others in Certain Transactions	32
Description of Capital Stock	34
Description of Options and Warrants	36
Plan of Distribution	41
Legal Opinions	41
Experts	41
Financial Statements	42

CAPITALIZATION

(Supplementing material appearing on page 5 of the Base Prospectus)

The capitalization of the Company and subsidiaries at March 31, 1971, and as adjusted to give effect to the issuance and sale of the shares offered hereby, is as follows:

	Authorized	Outstanding at March 31, 1971	Amount to be Outstanding at Completion of Offering
Long-term debt (including $5,231,000 due within one year) (1):			
Notes payable—banks		$ 6,107,000	$ 6,107,000
Notes payable—others		9,116,000	3,591,000(2)
Total		$ 15,223,000	$ 9,698,000
Minority interest in subsidiaries (3)		$ 2,305,000	$ 2,305,000
Stockholders' equity:			
Preferred stock, $1 par value	1,000,000 shs.		
Outstanding:			
Series A		380,500 shs	380,500 shs
Series B		154,500 shs.	154,500 shs.
Common stock, 5¢ par value	7,500,000 shs.(3)(4)(5)		
Outstanding		4,735,216 shs.(6)	5,585,216 shs.(2)(6)

(1) See Note 9 of Notes to Financial Statements.

(2) Assumes issuance of the maximum 850,000 shares at $6.50 per share ($5,525,000) to holders of Convertible Securities aggregating $6,000,000, with the remaining $475,000 of such securities not converted retaining their stated payment and other terms. (See "Selling Security Holders".)

(3) See Notes 1 and 10 of Notes to Financial Statements.

(4) See Notes 10 and 11 of Notes to Financial Statements for shares reserved for conversion of Preferred Stock and for shares issuable upon exercise of warrants and options, including those authorized by subsidiary companies, and see "Business—Automatic Toll Systems" for shares issuable and contingently issuable based upon agreements as amended in December 1970.

(5) Gives retroactive effect to the increase in the number of authorized shares of Common Stock (5¢ par value) from 6,000,000 to 7,500,000 shares, approved by the shareholders of the Company in June 1971.

(6) The Company has filed registration statements covering approximately 1,783,000 shares in addition to the shares offered hereby. Of these, 472,278 shares (already issued) are included in the Base Prospectus; 888,200 shares (800,000 not presently outstanding and 88,200 already issued) represent the maximum number of shares presently issuable to and which may be offered by the former ATS shareholders (see "Business—Automatic Toll Systems" in Base Prospectus); and the balance (already issued) represent shares to be offered by various selling shareholders. Based upon the terms of a "best efforts all-or-none" Underwriting Agreement executed on June 3, 1971, and if all of the shares are purchased by the Underwriters pursuant to said Agreement, the Company will be required to issue only 170,800 of the additional 800,000 shares to the former ATS Shareholders, and 300,000 will be sold for the account of the Company itself. The additional 470,800 shares to be issued pursuant to that Agreement are not included as outstanding shares in the above table.

(7) See Note 13 of Notes to Financial Statements for obligations under long-term leases.

USE OF PROCEEDS

Reference is made to the material appearing under the caption "Business—Oil Field Equipment and Supplies" relating to White Shield Leasing Corporation in the Base Prospectus. In exchange for the issuance of the shares offered hereby the Company will receive up to a maximum of $5,000,000 face amount of the Subordinated Convertible Debentures and $1,000,000 principal amount of Notes of its subsidiary White Shield Leasing Corporation. The amount of such securities received by the Company will be dependent upon the extent to which the holders of such securities elect to exchange the same for shares of the Company and the dates upon which such exchanges are made. Until June 30, 1972 the shares of the Company will be valued at $6.50 per share for purposes of such exchange, between July 1, 1972 and December 31, 1973 at $7.50 per share, and between January 1, 1974 and December 31, 1975 at $8.50 per share.

The securities of White Shield Leasing Corporation which are exchangeable for shares of the Company constitute a portion of the securities of that company sold in the latter part of 1969 and in early 1970 as described on page 19 of the Base Prospectus. The proceeds of that financing were used to provide capital for the purchase of oil and gas well completion installations by White Shield Leasing Corporation which it, in turn, leased to various drilling partnerships sponsored by the Company.

The Company intends to retain the Convertible Debentures and Notes of White Shield Leasing Corporation received in exchange for its shares, which securities will remain as debt obligations of this subsidiary.

The Company will not receive any portion of the proceeds from the resale of the shares which it issues upon the exchange. (See "Selling Security Holders".)

MANAGEMENT

(Supplementing material appearing on page 27 of the Base Prospectus)

On June 10, 1971 the shareholders of the Company elected Messrs. Herman Lopata and James B. Downing, Jr. as directors for terms expiring in 1972 and reelected Messrs. Austin, Gray and Styler for terms expiring in 1974.

SELLING SECURITY HOLDERS

(Superseding Material Appearing on Page 31 of the Base Prospectus.)

The selling security holders comprise the present holders of the Convertible Securities of White Shield Leasing Corporation who may exchange such securities for shares of the Company and in turn reoffer such shares hereunder (see "Plan of Distribution"). The Convertible Securities consist of $5,000,000 face amount of Subordinated Convertible Debentures and $1,000,000 principal amount of Notes of White Shield Leasing Corporation. These securities constitute a portion of the securities issued by that company in late 1969 and early 1970 in connection with a $7,000,000 financing, the remaining securities consisting of an additional $1,000,000 principal amount of Notes and Warrants for the purchase of 200,000 shares of the Common Stock of that company. Payment of the Debentures and Notes is guaranteed by the Company.

Under the terms of the original financing the Debentures were convertible into shares of White Shield Leasing Corporation at $6.25 per share, the Notes were not convertible, and the Warrants were exercisable at $12.50 per share. The holders of those securities also had certain rights to exchange the Notes and the shares of White Shield Leasing Corporation acquired upon conversion of the Debentures and exercise of the Warrants into shares of the Company. In December 1970 the conversion and exchange rights were amended, with the consent of more than a majority in interest of the holders, to provide that the Debentures and the third and fourth installments of the Notes aggregating $1,000,000 and payable in 1973 and 1974 would be convertible into not more than 850,000 shares of Common Stock of the Company. The rights granted by that amendment superseded and replaced the earlier conversion and exchange rights. (See "Business-Oil Field Equipment and Supplies" in Base Prospectus.)

Under the terms of the agreement now in effect, the holders of the Convertible Securities have the right, from time to time, until December 31, 1975 to exchange these securities or any portion thereof for shares of the Company, at the rate of $6.50 per share until June 30, 1972, of $7.50 per share between July 1, 1972 and December 31, 1973 and of $8.50 per share between January 1, 1974 and December 31, 1975. The Company is in no event required to issue more than an aggregate of 850,000 shares for such purpose, and, therefore, holders of the Convertible Securities are limited to their pro-rata share of such total, i.e., a holder of $300,000 of Convertible Securities ($250,000 of Debentures and $50,000 of convertible Notes) may in no event exercise conversion rights for a total of more than 42,500 shares of the Company. To the extent the Convertbile Securities are not exchanged, or if the maximum number of shares i[illegible] by the Company are issued in exchange for less than all the Convertible Securities, the remaining [illegible]rtible Securities will retain their stated payment terms, but will have no conversion or exchange rig[illegible] Thus if all of the holders of the Convertible Securities elected to exercise their maximum exchange rights prior to June 30, 1972, the Company would issue 850,000 shares in exchange for $5,525,000 face amount of Convertible Securities and the holders would continue to own $[illegible]75,000 of such securities which would continue to represent debt obligations of White Shield Leasing Corporation.

In the event the Company should declare any dividends payable in Common Stock or in securities convertible into Common Stock, the conversion price of the Company's shares will be adjusted, but no adjustment will be made in the maximum number of shares issuable by the Company for such purpose.

White Shield Leasing Corporation, which is presently a wholly-owned subsidiary of the Company, was formed for the principal purpose of engaging in the leasing of oil field equipment and supplies.

From its inception, the principal business activity of White Shield Leasing Corporation has been the purchasing of such equipment and supplies and the leasing of the same to drilling partnerships sponsored by the Company and its other subsidiaries. Leasing equipment for such purpose is not a common practice in the industry, and the drilling partnerships currently sponsored by the Company are not entering into any new leasing arrangements for such equipment. (See "Business—Oil Field Equipment and Supplies" in Base Prospectus.)

The purchasers of the White Shield Leasing Corporation securities represented that they were acquiring such securities for their own account and for investment. A Registration Statement under the Securities Act of 1933 has not been filed with respect to the securities of White Shield Leasing Corporation and therefore such securities may not be publicly offered or sold. The Company did, however, agree to file a Registration Statement with respect to its shares issuable upon conversion of these securities.

The identity of the present holders of the Convertible Securities of White Shield Leasing Corporation and the maximum number of shares of the Company which each of them may receive is set forth below. The holders of the Convertible Securities also hold $1,000,000 of White Shield Leasing Corporation Notes, which are not eligible for exchange, and the Warrants for the purchase of 200,000 shares of White Shield Leasing Corporation stock in the same proportion as the Convertible Securities.

Name of Holder	Convertible Securities of White Shield Leasing Corporation		Maximum Number of Common Shares Receivable upon Exchange of Convertible Securities	Other Shares of the Company Owned
	Debentures	Notes		
Joseph Y. Acone and T. Joan Acone ..... 2306 Tustin Avenue Newport Beach, Calif.	$ 10,000	$ 2,000	1,700	none
American Bank of Commerce ..... Trustee for Rodman Trusts 17-24 P.O. Box 4797 Odessa, Texas 79760	$100,000	$20,000	17,000	none
Associated Investment Co.(1) ..... 497 Main Street Ansonia, Connecticut	$250,000	$50,000	42,500	none
Beverly Enterprises, Ltd. ..... 3117 Beverly Drive Dallas, Texas	$250,000	$50,000	42,500	none
Alan R. Cartoun ..... Kenilworth Rd. Rye, New York	$125,000	$25,000	21,250	none
The Chy Company ..... P.O. Box 22607 Sacramento, California	$250,000	$50,000	42,500	none
Benjamin C. Cohen ..... 160 Central Park West New York, N. Y.	$125,000	$25,000	21,250	none
Charles F. Devine ..... 13605 Shaker Blvd. Cleveland, Ohio	$125,000	$25,000	21,250	none
Victor Elmaleh ..... 860 United Nations Plaza New York, New York	$ 75,000	$15,000	12,750	none
Robin Farkas ..... 730 Park Avenue New York, New York	$ 75,000	$15,000	12,750	none
Earle A. Griswold and Esther B. Griswold Tenants in Common 700 S. Ocean Blvd. Boca Raton, Fla.	$250,000	$50,000	42,500	none

Name of Holder	Convertible Securities of White Shield Leasing Corporation		Maximum Number of Common Shares Receivable upon Exchange of Convertible Securities	Other Shares of the Company Owned
	Debentures	Notes		
Growth Consultants Assoc.(2) ..... 595 Madison Ave. New York, N. Y.	$ 21,428	$ 4,286	3,642	16,000(2)
Growth Investments N.V. ..... Handelskade 8 Willemstad Curacao Netherland, Antilles	$ 42,857	$ 8,572	7,286	none
Benjamin B. Hampton(3) ..... 120 Central Park South New York, N. Y.	$ 50,000	$10,000	8,500	none
The Haven Fund ..... c/o Richard Thompson 375 Park Avenue New York, N. Y.	$ 42,857	$ 8,571	7,286	none
John J. Jasnosz and Diane M. Jasnosz .... 19791 Lexington Lane Huntington Beach, Calif.	$ 5,000	$ 1,000	850	none
Jetlands, Inc.(4) ..... 17 Church Street Christiansted, St. Croix U. S. Virgin Islands	$250,000	$50,000	42,500	none(4)
John F. Kelly(5) ..... 1780 Broadway New York, N. Y.	$250,000	$50,000	42,500	none
Monte A. Krissman ..... 9595 Stuart Lane Beverly Hills, Calif.	$ 18,214	$ 3,642.50	3,097	none
Harvey Glen Leason ..... 677 Vista Bonita Newport Beach, California	$100,000	$20,000	17,000	3,850
Leeds Venture(6) ..... 1101 16th St., N.W. Washington, D. C.	$100,000	$20,000	17,000	none
Joan H. Martin ..... c/o Trust Dept., Riggs National Bank 800 17th Street, N.W. Washington, D.C. 20013	$250,000	$50,000	42,500	none
Stewart R. Mott ..... 515 Madison Ave. New York, N. Y.	$125,000	$25,000	21,250	none
Nikko Bocki International, Inc. ..... 17 Barstow Road Great Neck, N. Y.	$ 75,000	$15,000	12,750	none
George K. Parry ..... W. E. Hutton & Co. 14 Wall Street New York, N. Y.	$125,000	$25,000	21,250	none
Pegasus International, S.A. ..... c/o Robert Fleming 100 Wall Street New York, N. Y.	$142,858	$28,571	24,286	none
John and Minerva Popp ..... 4906 Charing Cross Road Bloomfield Hills, Michigan	$250,000	$50,000	42,500	8,000
Joseph G. Rosen ..... 320 So. Harrison Street East Orange, N. J.	$250,000	$50,000	42,500	none
Paul Shettler ..... 2541 Vista Drive Newport Beach, Calif.	$ 20,000	$ 4,000	3,400	none

Name of Holder	Convertible Securities of White Shield Leasing Corporation		Maximum Number of Common Shares Receivable upon Exchange of Convertible Securities	Other Shares of the Company Owned
	Debentures	Notes		
Spring-Broadway Co.(7) ..... 500 South Spring Street Los Angeles, Calif.	$178,572	$35,715	30,357	none
T. J. Stevenson(8) ..... 11 Elderfields Rd. Manhasset, N. Y.	$250,000	$50,000	42,500	none
Trustees of Dartmouth College(9) ..... P. O. Box 31 Hanover, N. H.	$250,000	$50,000	42,500	none
Ira Waldbaum ..... 14 Manor Lane Lawrence, N. Y.	$175,000	$35,000	29,750	none.
Leonard Weller ..... 7146 La Presa Drive Hollywood, Calif.	$ 18,214	$ 3,642.50	3,096	none
J. W. Whitney, Jr., ... Alfred W. Gerow, W. R. Tipsword, Robert E. Spellman, Tenants in Common 1804 First National Bldg. Tulsa, Oklahoma	$250,000	$50,000	42,500	(10)
Milton Zeughauser ..... 35 Clover Lane New Rochelle, N. Y.	$125,000	$25,000	21,250	none
Total	$5,000,000	$1,000,000	850,000	

(1) Messrs. David Einbinder and Joel Young are the principals of Associated Investment Co. In addition to such principals, a number of the clients and a friend of Einbinder and Young, accountants, have an interest in the proceeds from the disposition by Associated Investment Co. of these securities.

(2) John W. Little II, a director of the Company, is a general partner of Growth Consultants Associates. See "Interest of Management and Others in Certain Transactions" in Base Prospectus.

(3) Four other persons also have a beneficial interest in these securities owned by Mr. Hampton.

(4) John Winter, a director of the Company, owns one-half of the stock of Jetlands, Inc. Mr. Winter owns 369,600 shares of White Shield Corporation Common Stock and his children an additional 1,600 shares in which he has disclaimed a beneficial interest. See "Interest of Management and Others in Certain Transactions" in Base Prospectus.

(5) Four business associates of Mr. Kelly have a beneficial interest in these securities.

(6) Four partners of the law firm of Prather, Levenberg, Seeger, Doolittle, Farmer & Ewing are members of this venture. In the period from December 1968 through January 1971 that firm received fees of $114,763 from the Company for legal services.

(7) One of the joint venturers in Spring-Broadway Company holding approximately a 28% interest therein withdrew from the venture and assigned his interest in the White Shield Leasing Corp. securities formally held by the venture to Messrs. Acone, Jasnosz, Krissman, Shettler and Weller, included as selling security holders herein.

(8) Mr. Stevenson's brother has a 50% beneficial interest in these securities.

(9) Dartmouth College received these securities as a gift from John W. Little II. See Note (2) above.

(10) Mr. Whitney is the owner of 197,972 shares of White Shield Corporation Common Stock and holds an additional 2,100 shares as custodian for children in which he disclaims a beneficial interest. Mr. Spellman is the owner of 2,000 shares and holds an additional 220 shares as custodian and guardian. Mr. Tipsword is the owner of 11,916 shares.

DESCRIPTION OF CAPITAL STOCK

(Supplementing material appearing on Page 34 of the Base Prospectus.)

On June 10, 1971, the shareholders of the Company approved the increase in the authorized Common Stock from 6,000,000 to 7,500,000 shares.

DESCRIPTION OF OPTIONS AND WARRANTS

(Supplementing material appearing on Page 37 of the Base Prospectus.)

On June 10, 1971, the shareholders of the Company approved the Amendment to the 1968 Stock Option Plan increasing the number of shares subject to such Plan from 150,000 to 285,000 shares.

PLAN OF DISTRIBUTION

(Superseding material appearing on Page 41 of the Base Prospectus.)

The shares of Common Stock offered hereby may be offered from time to time by the selling security holders following their receipt of such shares upon the exchange of the Convertible Securities. Such shares may be sold in the over-the-counter market at prices related to those prevailing in such market from time to time.

The selling security holders may pay regular brokerage commissions not exceeding those permitted to members of the National Association of Securities Dealers, Inc. who render assistance to them in connection with the sale of the shares offered hereby. The selling security holders and such participating members of the National Association of Securities Dealers, Inc. may be deemed to be underwriters as that term is defined in the Securities Act of 1933. The selling security holders have agreed to indemnify the Company from civil liabilities under the Securities Act of 1933 arising out of the use of this Prospectus as such liability may relate to information included herein furnished by the selling security holders.

The Company has agreed to pay all of the expenses (not including commissions) in connection with the registration of the shares offered hereby and has agreed to indemnify the selling security holders from civil liabilities under the Securities Act of 1933 arising out of the use of this Prospectus except insofar as such liability may relate to information included herein furnished by the selling security holders.

The Company has also agreed until such time as all of the Convertible Securities have been retired or converted into shares of the Company to file such new Registration Statements or such Amendments to this Registration Statement as may be required to permit the holders of the Convertible Securities to offer the shares of the Company received upon the exchange of such securities to the public.

The Company has filed additional Registration Statements relating to the offering of shares of its Common Stock by other selling security holders, which shares may be offered contemporaneously with the shares offered hereby. See "Capitalization".

PROSPECTUS

White Shield Corporation

472,278 Shares, Common Stock

(Par Value $.05 per Share)

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED ON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

The shares of Common Stock being offered hereby are being sold by certain shareholders of White Shield Corporation (the "Company"). See "Selling Shareholders". The Company will not receive any of the proceeds from such sales. The selling shareholders may be deemed to be "underwriters" with respect to the sale of the shares offered hereby as that term is defined in the Securities Act of 1933 (the "Act").

The shares of Common Stock offered hereby will be offered from time to time by the selling shareholders in the over-the-counter market.

While this offering is not being underwritten, the selling shareholders may use the assistance of members of the National Association of Securities Dealers, Inc. in connection with the sales of the securities offered hereby and may pay commissions not exceeding those permitted to such N.A.S.D. members for such assistance. See "Plan of Distribution". The Company and the selling shareholders respectively undertake to indemnify each other from such civil liabilities to the extent of the responsibility of each party for information in this Prospectus. Participating members of the N.A.S.D. may be deemed underwriters as that term is defined in the Act.

The proceeds to the selling shareholders will be the sale price less commission to be paid as above described. The Company's Common Stock is traded in the over-the-counter market. The bid price of such stock as reported by the National Quotation Bureau has ranged from $5¾ to $10⅝ during the quarter ended March 31, 1971, and from $10⅝ to $17 during the month of April 1971. On May 25, 1971 the stock was quoted $13⅝ bid, $13⅞ asked. See "Price Range of Common Stock."

The expenses in connection with the registration of the Common Stock offered hereby, estimated at $100,000 ($.21 per share), will be borne by the Company.

The Company incurred a net loss of $2,981,000 in 1970 and a net loss of $209,000 in the quarter ended March 31, 1971. See "Consolidated Statement of Income (Loss)" on page 6 hereof and the text commenting thereon following the notes to such statement appearing on page 9.

The Company has filed additional registration statements relating to the offering of additional shares of its common stock, which shares may be offered contemporaneously with the shares offered hereby. See "Capitalization".

The date of this Prospectus is June 3, 1971

Cover of Base Prospectus---See Exhibit "1"

AGREEMENT made this day of , 1971, by and between WHITE SHIELD CORPORATION (hereinafter the "Company") and a Selling Stockholder to be named in the Company's Registration Statement to be filed with the Securities and Exchange Commission relating to an offering of shares of the Company.

In consideration of the premises and in consideration of the execution of similar agreements by the other Selling Stockholders, the Company and the Selling Stockholder agree as follows:

1. The Company agrees that:

(a) it will mail to each Selling Stockholder following the effective date thereof, a copy of the final Prospectus and thereafter it will furnish to each Selling Stockholder such additional copies of such Prospectus which it may reasonably request and it will mail to each Selling Stockholder a copy of each Post-Effective Amendment or supplement thereto when the same shall become effective and

all furnish such additional copies thereof as each Selling Stockholder may reasonably request;

(b) in the event the Prospectus in the form then in the hands of the Selling Stockholders may not be used in connection with the sale of any of the shares included in the Registration Statement either because an amendment thereto is then in process or because the Prospectus does not then meet the requirements of Section 10(a)(3) of the Securities Act or because the Prospectus fails to disclose certain current information or for any other reason it will promptly so advise each Selling Stockholder;

(c) when according to information furnished to it by the Selling Stockholders the distribution contemplated by the Registration Statement has been completed or when all unsold shares have been deregistered it will so inform each of the Selling Stockholders;

(d) it will make available to the Securities and Exchange Commission from time to time upon request of the Commission all information received by it from the Selling Stockholders pursuant to Paragraph 2 hereof.

2. The Selling Stockholders severally agree that each of them:

(a) will promptly advise the Company of any intention to offer the shares in a manner or on a basis other than that set forth in the Prospectus;

(b) is familiar with Rules 10b-2, 10b-6 and 10b-7 of the General Rules and Regulations of the Securities Exchange Act of 1934 and will engage in no transactions or activities prohibited by said Rules and without limiting the generality of the foregoing, each Selling Stockholder will inform any broker through whom it makes a sale that such shares are part of a distribution and that such broker is subject to the provisions of Rule 10b-6, and each Selling Stockholder will not buy or bid for or solicit purchases by others of securities of the same class as those offered by it until the offering by all of the Selling Stockholders is complete or the unsold portion of such shares are deregistered;

(c) will promptly advise the Company when the shares being offered for its account have been sold and

will from time to time upon request of the Company advise it of the date and price of each disposition of shares made by it pursuant to the Registration Statement giving, if requested by the Company, the name of the selling broker with whom it placed the order and the name of the purchaser if no broker was utilized;

(d) consents to the undertaking to be given by the Company to the Securities and Exchange Commission to the effect that for purposes of determining liabilities under the Securities Act each Post-Effective Amendment to the Registration Statement shall be deemed to be the initial bona fide offering to the public of the shares being offered thereunder;

(e) agrees to furnish to the Company such information from time to time as the Company may be requested to furnish to the Securities and Exchange Commission concerning such Selling Stockholder.

3. The Company represents and warrants to each Selling Stockholder that when the Registration Statement becomes effective the Registration Statement and the Prospectus will comply in all material respects with the

provisions of the Securities Act of 1933 and the rules and regulations of the Securities and Exchange Commission thereunder, and that they will not contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading, except that this representation and warranty does not apply to statements or omissions in the Registration Statement or the Prospectus based upon information furnished to the Company in writing by any Selling Stockholder expressly for use therein.

The Company agrees to indemnify and hold harmless each Selling Stockholder and each person, if any, who controls any Selling Stockholder within the meaning of Section 15 of the Securities Act of 1933, from and against any and all losses, claims, damages and liabilities caused by any untrue statement of a material fact contained in said Registration Statement, or in said Prospectus or any Preliminary Prospectus, or caused by any omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading, except insofar

as such losses, claims, damages or liabilities are caused by any such untrue statement or omission based upon information furnished in writing to the Company by any Selling Stockholder expressly for use therein.

In case any action shall be brought against any Selling Stockholder or any person controlling such Selling Stockholder, based upon the Registration Statement or Prospectus or any Preliminary Prospectus, and in respect of which indemnity may be sought against the Company, such Selling Stockholder shall promptly notify the Company in writing, and the Company shall assume the defense thereof, including the employment of counsel and the payment of all expenses. Any Selling Stockholder of any such controlling person shall have the right to employ separate counsel in any such action and participate in the defense thereof, but the fees and expenses of such counsel shall be at the expense of such Selling Stockholder or such controlling person unless the employment of such counsel has been specifically authorized by the Company. The Company shall not be liable for any settlement of any such action without its consent, but if settled with the consent of the Company or if there

be a final judgment for the plaintiff in any such action, the Company agrees to indemnify and hold harmless any Selling Stockholder and any such controlling person from and against any loss or liability by reason of such settlement or judgment.

Each Selling Stockholder agrees to indemnify and hold harmless the Company, its directors and such of its officers who have signed the Registration Statement to the same extent as the foregoing indemnity from the Company to each Selling Stockholder, but only with reference to statements or omissions based upon information relating to such Selling Stockholder furnished in writing by such Selling Stockholder, or on its behalf, expressly for use in said Registration Statement or the Prospectus or any Preliminary Prospectus. In case any action shall be brought against the Company, or any such director or officer, based on the Registration Statement or the Prospectus or any Preliminary Prospectus and in respect of which indemnity may be sought against any Selling Stockholder, the Selling Stockholder shall have the rights and duties given to the Company

and the Company or any such director or officer shall have the rights and duties given to the Selling Stockholder by the third paragraph hereof except that if the action also involves any matters in respect of which the indemnity may not be sought against the Selling Stockholder, then the Company, any such director or officer, rather than the Selling Stockholder, shall assume the defense of such action, including the employment of counsel and the payment of all expenses. The Selling Stockholder shall not be liable for any settlement of any such action effected without its consent.

_____
Selling Stockholder

WHITE SHIELD CORPORATION

By_____

Exhibit "6" to Solomon Affidavit
Counsel's Letter to Selling Shareholders

POLETTI FREIDIN PRASHKER FELDMAN & GARTNER

777 THIRD AVENUE

NEW YORK, N. Y. 10017

JESSE FREIDIN
JUSTIN N FELDMAN
HERBERT GARTNER
MURRAY GARTNER
LAWRENCE H REILLY
GEORGE J SOLOMON
PETER H MOSS
ROBERT E CARTER
PAUL P FRANK
ROBERT M HAFT
ERIC ROSENFELD
PAUL R GRAND

AREA CODE 212
688-2200

CABLES-POLTREE

CHARLES POLETTI
COUNSEL

June 3, 1971

To the Selling Shareholders of the
White Shield Corporation Registration
Statement Nos. 2-40397 and 2-40398:

Please be advised that the Securities and Exchange Commission requested, and White Shield Corporation has therefore agreed, that the Prospectus in which you are included as a Selling Shareholder will from time to time, as necessary, be amended and/or supplemented to disclose the identity of any NASD broker dealer who participates in the distribution of more than 10% of the shares covered by the Registration Statement in which your shares are included. Any broker dealer participating in the distribution of more than 10% of such shares will be described in the Prospectus as an underwriter within the meaning of the Securities Act of 1933.

Your agreement with the company pursuant to which your shares have been included in the pending Registration Statements provides that you will furnish the company such information, from time to time, as it may be requested to furnish to the SEC. For this purpose, therefore, it is essential that we be notified promptly as to the identity of each broker dealer firm you may utilize in the sale of your shares and the number of shares which you have requested such broker dealer to sell on your behalf. Even though your own shares may represent less than 10% of the total, it is, of course, possible that the same broker dealer firm will be used by more than one of the Selling Shareholders. Consequently, the information must be furnished even if the number of shares for which you are dealing with a broker is less than 10% of the total. For your information, the number of shares included in the Registration Statement relating to the White Shield Leasing Corporation security holders is 850,000 shares, and the number of shares included in the so-called miscellaneous registration is 422,513.

We will, of course, advise you promptly when the Registration Statements become effective.

Very truly yours,

George J. Solomon

Exhibit "7" to Solomon Affidavit
Plaintiffs' Letter to Issuer's Counsel

Ex #7

THOMAS J. BYRNES
420 EAST 55TH STREET · APT. 10D
NEW YORK, N. Y. 10022

TELEPHONE: (212) 753-1438

June 14, 1971

Mr. George Solomon
Poletti, Freiden, Prashker
Feldman & Gartner
777 Third Avenue
New York, N.Y.

Dear George:

Subsequent to the notice of effectiveness of the miscellaneous White Shield Corporation registration statement, the following individuals sold the enumerated shares through Tobey & Kirk, 52 Wall Street, New York, N.Y. (Contact Mr. Vincent Foss, Jr. - Partner HA 2-8030) on 6/7, 6/8 and 6/9/71.

	Shares registered for sale	Shares Sold
Thomas J. Byrnes	68,400	68,400
Francis R. Santangelo	51,600	51,600
Peer T. Pedersen	4,000	4,000
Vincent Draddy	24,000	20,000
	148,000	144,000

The 144,000 shares were sold by Tobey & Kirk to the following dealers in the amounts as listed:

Suez American	2,500
F.I. Dupont, Glore Forgan	700
Siedler Arnet & Spielman	500
McDonald Shobar & Co.	200
Sherwood Securities	5,400
Singer & Mackie, Inc.	1,500
G.A. Saxton	200
Brukenfeld, Mitchell & Co.	9,000
Troster, Singer & Co.	1,000
Dominick & Dominick	500
Faulkner, Dawkins & Sullivan	44,000
Stone, Summers & Co.	1,900
C. B. Richard, Ellis & Co.	100
Mitchum, Jones, & Templeton	500

--continued--

Leason & Co.	71,900
M.S. Wien & Co.	1,100
M.H. Meyerson & Co.	2,000
Robey & Kirk	1,000
	144,000

If there is any more data required please let me know or else contact Mr. Ross at Tobey & Kirk.

Sincerely,

Thomas J. Byrnes

Thomas J. Byrnes

TJB:fo

Affidavit of Thomas J. Byrnes, in Support of Plaintiffs' Motion for Summary Judgment

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CAPTION OMITTED

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

THOMAS J. BYRNES, being duly sworn, deposes and says:

1. I am one of the plaintiffs in this action. I am familiar with the facts, and submit this affidavit in support of plaintiffs' motion for summary judgment.

2. I acquired beneficial interest in a block of the common stock of White Shield Corporation ("White Shield"), on or about September 6, 1968, from certain of the officers and/or directors of White Shield, pursuant to investment representations. Some of the stock was registered in the name of Byrnesan Associates,

a joint venture or co-partnership between me and my co-plaintiff, Francis R. Santangelo. At the time of the acquisition of the stock, plaintiffs were given the right to registration of their stock at some point in the future.

3. In 1971 I learned that White Shield was filing a registration statement with the Securities and Exchange Commission, and requested that all of the stock in which I had a beneficial interest, and some of the stock beneficially owned by the plaintiff Santangelo, be included in the registration statement. White Shield agreed to register such shares in accordance with our said request.

4. On the morning of June 7, 1971, I was present in the office of plaintiff Santangelo, together with Mrs. Santangelo and Mr. Vincent Ross, a partner in counterclaim-defendant Tobey & Kirk, awaiting notification from White Shield's attorneys that the registration statement in which our White Shield stock was included had been declared effective by the Securities and Exchange Commission, so that we could sell the stock. I had previously been informed by plaintiff Santangelo and/or by Mr. Ross that defendant Faulkner had expressed an interest in acquiring a block of some 44,000 shares of our White Shield stock, which Santangelo and I agreed to divide evenly.

5. While I was in Mr. Santangelo's office, he received a telephone call from one of the traders at Faulkner, who was offering to purchase our White Shield stock. I heard Mr. Santangelo inform the Faulkner trader that the registration statement

was not yet effective. Thereafter we were advised by counsel for White Shield that the registration statement had been declared effective, and, when Mr. Santangelo received another call from a representative of Faulkner, he informed Faulkner's representative, in my presence, that we were effective but before he could sell Faulkner the stock he had to ascertain whether another interested trader wanted the stock.

6. I thereupon placed a call to Havenfield Corporation, with which I had had some discussions concerning its expressed interest in acquiring some of the stock which we would be offering for sale, and to which I had furnished a copy of the "red herring" prospectus covering our shares. Havenfield was somewhat non-committal about buying the stock during our conversation, but promised to call back.

7. Shortly thereafter, Mr. Santangelo received another telephone call from the Faulkner trader, Mr. MacMillen, and I heard him discussing with MacMillen a sales price of $14 per share for 44,000 shares of stock. In view of Havenfield's apparent lack of interest, I agreed with Mr. Santangelo to go ahead with Faulkner. Having agreed upon a price, Mr. Santangelo told Mr. MacMillen that the sale would have to be made through our broker, Tobey & Kirk.

8. A few minutes later Mr. Vincent Ross received a telephone call from his office, routing a telephone call from Mr. MacMillen of Faulkner, and I heard Ross confirm that "I sold you 44,000 shares at $14", or words to that effect.

9. I was informed by Tobey & Kirk shortly afterwards, either on the 8th or 9th of June, 1971, that Tobey & Kirk had fully sold out the shares that Mr. Santangelo and I were offering pursuant to the registration statement of White Shield, and in due course I received confirmations from Tobey & Kirk respecting those sales.

10. On or about June 15, 1971, I learned from Mr. Ross or from Mr. Santangelo that Faulkner had rejected the sale of our stock for reasons which I did not understand at that time. The following day I was advised that Singer & Mackie, Inc. had similarly rejected 1,500 shares of White Shield stock which Tobey & Kirk had sold to it for our account on or about June 8, 1971. Between the time of the sales on June 7 and 8, and the time of the two rejections, the market price of White Shield had fallen substantially.

11. I immediately informed Vincent Ross and Anthony Cueva, another partner of Tobey & Kirk, that this was their problem to resolve, and urged them to get their lawyers working on it. I spoke to one or the other of them repeatedly, requesting reports on the status of the discussions between them and Faulkner. In addition, my lawyer, Mr. Raymond Merritt of Willkie, Farr & Gallagher, discussed the problem with me and, by telephone, with Mr. Green of Faulkner. Mr. Merrit was obliged to withdraw as my counsel because of potential conflicts of interest presumably stemming from the fact that his firm then represented IOS, Ltd., one of the subsidiaries of which, FOF Proprietary Funds, Ltd.,

was involved in one of the four White Shield registration statements that became effective in June 1971.

12. During the week of June 21, 1971 (I am now informed that it was on June 21, 1971), I attended a meeting at the offices of Faulkner together with plaintiff Santangelo and Mr. Ross. Representing Faulkner were Marc R. Green, James MacMillen, Jay Vanneck, and one or two other persons whose names I do not recall. The entire situation was discussed, and Faulkner's position, as set forth by Mr. Green, was that Faulkner could not accept the stock because to do so would involve Faulkner in a violation of Rule 10b-6. That was the only ground advanced by Mr. Green for Faulkner's refusal to go through with the sale. The meeting of June 21, 1971 ended without a final resolution, with Mr. Green promising to see if there was any way Faulkner could lawfully accept the stock, and advising us that he would get back in touch with Mr. Ross with Faulkner's answer.

13. There was no suggestion whatever at that meeting by anyone representing Faulkner that either Santangelo or Ross had in any way misrepresented any facts to Faulkner in the course of the conversations leading up to the sale, although there was some reference by, I believe, Mr. MacMillen, that he had not understood some aspects of their discussions.

14. During the course of that meeting Mr. MacMillen specifically said that he knew, prior to the sale in suit, that the stock which Santangelo had sold to Faulkner was included in a registration statement, and I recall Mr. MacMillen's being put down by Mr. Green, who told him, in effect, to keep quiet.

15. On or about June 22, 1971, White Shield announced that one of its Indonesian test drillings had showed non-commercial quantities of oil, which resulted in a further price decline in White Shield stock, and required that the prospectus be "stickered". Annexed hereto and incorporated herein as Exhibit "8" is a copy of the release on White Shield's letterhead, with a note from counsel forbidding further use of the prospectus until it had been "stickered"; a copy of the release as it appeared on the Dow Jones "broad tape"; and a copy of the "sticker amendment" to page 17 of the underlying "Base Prospectus" dated June 3, 1971.

16. During the summer of 1971 I remained in fairly regular contact with Messrs. Ross and Cueva, and was repeatedly assured by them throughout July 1971 that discussions were still continuing between Tobey & Kirk's attorneys and Mr. Green, but that one of Tobey & Kirk's attorneys was away from the city during a part of that time, either on vacation or on business.

17. In early August, 1971, I was told by Mr. Ross that there was no further prospect of Faulkner's agreeing to accept the stock we had sold to it, and he advised me that we should commence to resell it over a period of time, since the market for the stock was still weak.

18. I instructed Ross to resell the 22,750 shares of White Shield in which I had a beneficial interest at a price of $9.00 per share, or better, if possible, and in lots of 1,000 or so shares, so as not to depress the market price of the stock, but I allowed him to use his discretion.

19. I was advised by Ross that he would be required to give official notification to Singer & Mackie when he resold stock for that firm's account, and I instructed him to sell out the large position for Faulkner's account first (i.e., 22,000 shares), and only when the Faulkner resale was completed, to commence resales for the account of Singer & Mackie, Inc., and then on a single day, if possible.

20. Since I would have received a net of $302,555 after taxes and brokerage commissions had Faulkner not cancelled the sale agreement of June 7, 1971 with respect to the 22,000 shares which I sold to it, I am suing Faulkner to recover the difference between that net amount from the contract price, and the net amount which I actually realized from the resales for Faulkner's account, or a total of $111,197.67, together with interest and costs.

21. During the last three weeks or so of August and into September 1971, I received from Tobey & Kirk confirmations of sales which it had made for my account. I annex hereto as Exhibit "9" facsimile copies of the fronts of the respective confirmations. For the Court's convenience, I set forth below, in tabular form, a recapitulation of the resales which Tobey & Kirk made for my account, as confirmed to me by Tobey & Kirk in the regular course of its business, and divided first into sales on which I debited Faulkner, and then on sales on which I debited Singer & Mackie, Inc.

Resales for the account of Thomas J. Byrnes

Date (1971)	No. Shares	Price	Extension	Net to Byrnes
8/10	2,800	$9	$25,200.00	$24,707.00
8/10	200	9-1/8	1,825.00	1,787.74
8/11	2,700	9	24,300.00	23,813.00
8/11	300	9-1/8	2,737.50	2,681.61
8/11	2,000	9-1/4	18,500.00	18,125.00
8/12	1,500	9-1/2	14,250.00	13,965.00
8/12	500	9-3/8	4,687.50	4,593.10
8/17	200	9-1/2	1,900.00	1,862.00
8/20	1,000	9-3/8	9,375.00	9,186.20
8/20	1,550	9-1/4	14,337.50	14,046.87
9/2	2,000	8-1/4	16,500.00	16,145.00
9/7	1,500	7-5/8	11,437.50	11,185.55
9/7	250	7-1/2	1,875.00	1,832.50
9/8	1,000	7-3/8	7,375.00	7,206.20
9/14	1,250	9	11,250.00	11,018.75
9/15	1,000	9-1/8	9,125.00	8,938.70
9/16	1,000	9-3/8	9,375.00	9,188.70
9/17	800	9	7,200.00	7,052.00
9/17	450	9-1/8	4,106.25	4,022.41
FAULKNER				
	22,000		$195,356.25	$191,357.33
SINGER				
9/17	750	9-1/8	6,843.75	6,704.02
TOTAL	22,750		$202,200.00	$198,061.35

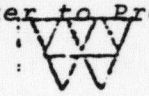
THOMAS J. BYRNES

Sworn to before me this

7th day of February, 1975

REGINALD C. DUFF
Notary Public, State of New York
No. 31-0112783
Qualified in New York County
Commission Expires March 30, 1976

Exhibit "8" to Byrnes Affid.
White Shield Press Release 6/22/71, Notification and Sticker to Prospectus



WHITE SHIELD CORPORATION

595 Madison Ave
New York, N.Y. 10022
(212) 758-1930

June 22, 1971

FOR IMMEDIATE RELEASE

White Shield Corporation reported today that Aminoil Indonesia, as operator for itself, White Shield Indonesia, and Tri-Continental, had concluded drill testing of the group's first offshore exploratory well commenced April 23 on the Bengkulu shelf off the South Coast of Sumatra.

The well, drilled on the flank of the structure designated B, approximately 35 miles South of Bengkulu, tested non-commercial shows of high gravity crude oil from porous Batu Raja limestone and is being plugged at a total depth of 5[illegible]0 feet.

The initial drilling results will be analyzed together with the data obtained from related geological and geophysical surveys prior to the selection of the next drill test site on the Bengkulu Shelf.

Pending this analysis, the Glomar V drilling vessel, under contract to the operator, will be moved to an offshore location on a structure designated Alpha in the Sunda Straits basin between Java and Sumatra, to commence testing drilling in the Eastern portion of the group's offshore contract area. The group's first test well in the Sunda Straits is scheduled to be commenced within the next two weeks.

Tulsa Office: 1601 South Main Street, PO Box [illegible] Tulsa Oklahoma 74101 Phone: (918) [illegible]

Exhibit "8" to Byrnes Affid.
White Shield Press Release 6/22/71, Notification and
Sticker to Prospectus

June 22, 1971

The following is the text of a Western Union mailgram dispatched to you today:

White Shield press release reporting first Indonesian test well results issued today and being mailed to you. Release states that first well on Bengkulu Shelf tested non-commercial shows of high gravity oil and is being plugged. Second test well to be commenced within next two weeks in Sunda Straits. Prospectus Supplement being reviewed by SEC and will be sent you later this week. Until Supplement affixed to Prospectus neither you nor your brokers may use Prospectus in present form for further sales.

George Solomon, Registration Counsel
White Shield Corporation

WHITE SHIELD COMPLETES TEST DRILL
ON OFFSHORE SUMATRA COAST WELL

N Y -DJ- WHITE SHIELD CORP SAID AMINOIL INDONESIA AS OPERATOR FOR ITSELF WHITE SHIELD INDONESIA AND TRI-CONTINENTAL CONCLUDED DRILL TESTING OF THE GROUP'S FIRST OFFSHORE EXPLORATORY WELL ON THE BENGKULU SHELF OFF THE SOUTH COAST OF SUMATRA.

THE WELL DRILLED ON THE FLANK OF THE STRUCTURE DESIGNATED 'B' ABOUT 55 MILES SOUTH OF BENGKULU TESTED NON-COMMERCIAL SHOWS A HIGH GRAVITY CRUDE OIL FROM POROUS BATU RAJA LIMESTONE AND IS BEING PLUGGED AT A TOTAL DEPTH OF 5 620 FEET.

THE INITIAL DRILLING RESULTS WHITE SHIELD SAID WILL BE ANALYZED ALONG WITH THE GEOLOGICAL AND GEOPHYSICAL SURVEYS PRIOR TO THE SELECTION OF THE NEXT DRILL TEST SITE ON THE BENGKULU SHELF.

PENDING THIS ANALYSIS THE SEDCO MARV DRILLING VESSEL UNDER CONTRACT TO THE OPERATOR WHITE SHIELD SAID WILL BE MOVED TO AN OFFSHORE LOCATION ON A STRUCTURE DESIGNATED ALPHA IN THE SUNDA STRAITS BASIN BETWEEN JAVA AND SUMATRA TO BEGIN TESTING DRILLING IN THE EASTERN PORTION OF THE GROUP'S OFFSHORE CONTRACT AREA.

THE GROUP'S FIRST TEST WELL IN THE SUNDA STRAITS IS SCHEDULED TO BE STARTED WITHIN THE NEXT TWO WEEKS.

-0-

TVA SELLS 160 MILLION LLS NOTES AT 5.543 PC

N Y -DJ- THE TENNESSEE VALLEY AUTHORITY SAID IT AUCTIONED 160 MILLION DLS OF 126-DAY NOTES AT AN AVERAGE ANNUAL NET INTEREST COST OF 5.543 PC.

THE NOTES ARE DATED JUNE 24 AND MATURE NEXT OCT. 28.

-0-

BEST COPY AVAILABLE

Exhibit "8" to Byrnes Affidavit---
Sticker Supplement to Prospectus

WHITE SHIELD CORPORATION

Supplement dated June 22, 1971 to page 17 of Prospectus dated June 3, 1971.

The first exploratory well on the Indonesian Production Sharing Contract area, which was drilled on the Bengkulu Shelf, tested non-commercial shows of high gravity crude oil from porous Batu Raja limestone, and is being plugged at a total depth of 5820 feet.

Pending analysis of the drilling results and data obtained from related geological and geophysical surveys on the basis of which the next drill test site on the Bengkulu Shelf will be selected, the second exploratory well for which the drilling vessel has been contracted will be on a structure in the Sunda Straits basin. This well is scheduled to be commenced within the next two weeks.

Exhibit "9" to Byrnes Affidavit---Byrnes's Confirmations, Omitted

Affidavit of Francis R. Santangelo, Submitted in Support of Plaintiffs' Motion for Summary Judgment

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CAPTION OMITTED

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

FRANCIS R. SANTANGELO, being duly sworn, deposes and says:

1. I am one of the plaintiffs in this action, am fully familiar with the facts, and make this affidavit in support of plaintiffs' motion for summary judgment.

2. I was deposed on October 27, 1972 by the present counsel for defendant Faulkner, Dawkins & Sullivan, in the state-court action which plaintiff Byrnes and I had commenced, which the parties have agreed to stay pending a resolution in this

Court. I am advised by counsel that the transcript of that deposition cannot be used as such in the present action. Rather than reviewing at length in the present affidavit the testimony which I there gave on oath and subject to, in effect, cross-examination, I incorporate by reference herein, as Exhibit "10", the contents of the said transcript of my testimony, as if it were set forth herein in full.

3. Given the nature of a deposition, some of the testimony is not as clear as it could be. I categorically and without qualification attest to the fact that in my conversations with Mr. James MacMillen, who was seeking, on behalf of defendant Faulkner, Dawkins & Sullivan, to purchase 44,000 shares of the stock of White Shield that was included in a registration statement which became effective on June 7, 1971, I explicitly informed him that the stock was subject to a registration statement, and that I could not sell it to him until the registration statement had become effective. I must have said this to him several times, because he was calling me every single business day from June 1, 1971 to June 7, 1971, trying to purchase my stock.

4. Having had the Jaffee rule explained to me, I can now appreciate why a market-maker might have been concerned with whether or not stock which was being offered to him was in registration. However, in June 1971 I had never heard of Jaffee, and had no idea why MacMillen kept asking the same questions over and over. He did at one point explicitly ask me whether the stock I was selling was part of the "Leason secondary", which I understood

to be a reference to a public offering of stock of White Shield which was being underwritten by Leason & Co., the registration statement of which was expected to become effective at about that same time (it was declared effective on June 4, 1971). I explicitly informed Mr. MacMillen that my stock was not part of the "Leason secondary", which it was not.

5. I had no reason or incentive to deny that my stock was registered, or to state affirmatively that it was not registered, which I understand is one of the accusations which Faulkner has made. As a specialist on the American Stock Exchange, I have enough familiarity with the Securities Act of 1933 to know that it is unlawful to sell securities which are in distribution unless the securities are accompanied by a prospectus. To lie about the registered character of the White Shield stock I was selling would have been foolish since I would be obliged to deliver, through my broker, a copy of the final prospectus with the stock within seven business days after the sale. The prospectus would, of course, disclose that I was a selling shareholder.

6. On the other hand, as a specialist on the American Stock Exchange, I had no reason to be familiar with the Jaffee interpretation of Rule 10b-6, because, as a practical matter it affects my business not at all. But I would have had to know of that rule to have an incentive to lie about the fact that the stock I was selling was part of a registered distribution. On no theory did I have any reason or incentive to represent to MacMillen that I had any stock in the Leason secondary, because I

had no stock in that distribution, and I never made any such representation, whatever he may claim he understood.

7. I attended a meeting at Faulkner, Dawkins & Sullivan in late June, 1971 (I am now informed that the meeting occurred on June 21, 1971). At that meeting I confronted Mr. MacMillen, and he largely agreed that I had informed him, prior to the sale, that I was selling stock pursuant to a registration statement. He did say, however, that there were aspects that he had not understood. At that meeting, Faulkner's attorney, Mr. Green, dominated the conversation and explained that Faulkner could not legally take the stock because of Rule 10b-6. There was never any accusation at that time that either Vincent Ross, my broker, or I, had lied to Faulkner's traders.

8. When the meeting broke up, it was my understanding that Faulkner would explore all possibilities to ascertain if there was any lawful way for it to accept the stock and go through with the trade. Thereafter, I kept after Vincent Ross and Anthony Cueva, partners of Tobey & Kirk, regarding the status of the transaction. I was repeatedly informed by one or the other of them that the matter was being handled by Tobey & Kirk's attorneys. Mr. Ross told me that he did not think it was appropriate for him to insert himself in conversations between counsel on a subject which he did not fully udnerstand. I was also advised that the securities lawyer in the law firm handling the matter for Tobey & Kirk was out of town a great deal, which complicated communications.

9. It was around August 9, 1971, that Mr. Ross informed me that Tobey & Kirk's lawyers had advised him that there was no possibility that Faulkner would go through with the sale transaction, and I thereupon directed Mr. Ross to commence resales at once. I instructed him that the sales should be carried out, to the extent possible, in relatively small lots since the market for White Shield stock was weak and any sign of an anxiety to sell a large block of stock would depress it further. I told him to try to obtain $9.00 or better per share.

10. I was informed by Mr. Ross that he would be obliged to give Singer & Mackie some kind of written document when stock was resold for its account, and I therefore instructed him to sell out the larger block for the account of Faulkner before commencing to resell for the Singer & Mackie account.

11. I thereafter regularly received confirmation slips attesting to the resales, which I turned over to my accountant, who is unable presently to locate them. Subsequent to September 30, 1971, I received from Tobey & Kirk a recapitulation of all sales of White Shield stock made in 1971 for my account by Tobey & Kirk. I annex a copy of that recapitulation as Exhibit "11", together with copies of Tobey & Kirk's monthly statements (excised to reflect only transactions in the stock of White Shield Corporation), and incorporate same herein by reference. I respectfully direct the Court's attention to the fact that although the specific sales on the two documents exactly match each other, the dates on the recapitulation are earlier than those on the monthly statements

(which were partly obscured in the original photo-copying). The explanation of this discrepancy is that the recapitulation reflects the dates of the respective sales, while the monthly reports reflect the settlement dates, typically one week after the trade.

Francis R. Santangelo

FRANCIS R. SANTANGELO

Sworn to before me this

12th day of February, 1975

REGINALD L. DUFF
Notary Public, State of New York
No. 31-4110723
Qualified in New York County
Commission Expires March 30, 1976

Q What is your address?

A Home address?

Q Yes, please.

A Applejack Farm, Rye Ridge Road, Harrison, New York, 10538.

Q Mr. Santangelo, are you presently employed?

A Yes.

Q By whom?

A Self-employed.

Q What is the nature of the employment?

A I am a specialist on the American Stock Exchange.

Q Were you employed in June of 1971?

A Yes.

Q Same employment?

A Yes.

Q On or about June 1, 1971, did you own any common stock of White Shield Corporation?

A Yes.

Q Do you recall how many shares you owned at the time?

A A hundred thousand. I am not sure.

Q Approximately a hundred thousand shares. Do you recall when your shares were acquired?

A No. Excuse me, I can get all this information from Tom.

MR. BYRNES: You can't call.

A I really don't remember any of this.

MR. DUFF: Do you want the witness's recollection refreshed?

MR. BAYDA: Did you have something to refresh his recollection?

MR. DUFF: I am showing the witness the prospectus dated June 7, 1971, which contains a statement as to the number of shares he owned as of the time the prospectus became effective.

A Eighty-two thousand four hundred.

Q Were your eighty-two thousand four hundred shares all acquired at the same time, to your recollection?

A Yes.

Q Do you recall when?

MR. DUFF: I will see if I can get that for you, too.

A 1968.

Q Do you recall how they were acquired?

A Yes, we bought them from three of the principals of White Shield.

Q When you say "we", who are you referring to, sir?

A Tom Byrnes and myself.

Q Does this figure 82,400 include shares owned by Mr. Byrnes?

A No.

Q What business is Byrnesan Associates engaged in, sir?

A No business. It was a partnership formed to purchase the stock of White Shield.

Q And, are you a member of that partnership, sir?

A Yes, was.

Q You were a member in June of 1971?

A I don't remember. I know we sold the stock individually. I don't remember exactly what happened, or how it was done.

Q Can you tell us the name of the members of Byrnesan Associates in June of '71?

A Just Tom Byrnes and myself.

Q To your knowledge, how many shares of common stock of White Shield Corporation were owned by Mr. Byrnes in June of 1971?

A It should be the exact amount I have.

was made, you had no knowledge, sir?

A That they were a market maker?

Q Correct.

A Not specifically.

Q Can you explain that?

A Yes. I mean, knowing Faulkner--explain how I spoke to them--I mean it's--

MR. DUFF: You have been asked to explain it. Do it any way you want.

A Well, I had been speaking to Mr. Ross and we were talking about the underwriting, etcetera, and I said to him, who is interested in the stock, and he mentioned a couple of names. He said, "I understand Faulkner has a big interest in the stock--was a big buyer of the stock"--that was his exact--how I first--his first words to me about it. So, I said, I said, "Have you spoken to anybody over there?" So, he said, "No." I said, "Who told you?" He said Sherwood Securities had told him about it. So, I said, "I have got a great friend over there. I'll call him." So, I called over there and spoke to Jay Van Eyck and asked him if he had an interest and he said he didn't really know because he wasn't the one handling that stock or interested in it.

He said he'd let me know if they did have an interest. He said thanks, and that was it. It was either the next day or two days later that I got a call from a fellow by the name MacMillen. I don't remember his first name.

MR. DUFF: James MacMillen.

A James MacMillen and he asked me if I had any stock for sale, and I told him I would have stock for sale. I was waiting for it to come out of the S.E.C. That it wasn't effective as yet, but I would have a stock for sale, and I was interested in selling it in one chunk and disposing of the entire matter.

Q Did you have any other conversations with Mr. MacMillen?

MR. DUFF: At any time?

Q In June of 1971, concerning the sale of your White Shield stock?

A I would say I spoke to him between five to ten times in three days prior to the effective date of the registration.

Q Did you speak to anyone else at Faulkner, Dawkins and Sullivan at that time?

A Prior to the effective date, no.

Q Did you speak with a Mr. Latuga at Faulkner, Dawkins and Sullivan, to your recollection?

A I don't remember the name.

MR. DUFF: L-a-t-u-g-a.

Q L-a-t-t-u-g-a?

MR. DUFF: E-g-a?

MR. BAYDA: U-g-a.

Q Did the shares which you discussed with Mr. MacMillen include shares owned by Mr. Byrnes or were they solely your shares?

A It would include Mr. Byrnes.

Q How many shares were you talking about in the aggregate?

A 44,000.

Q Did you advise Mr. MacMillen in any of your conversations with them, pertaining to this sale, that these shares, your shares, and Mr. Byrnes' shares, were included in a registration statement of White Shield Corporation?

A The answer is yes. How I advised him is something--I mean, specifically, did I say these are coming out of a registration? Is that your question?

Q Specifically, did you tell him that these

shares were included in a registration statement for disposition by you and Mr. Byrnes?

A Yes, because he kept calling me to buy the stock, and I told him I couldn't sell it to him until it became effective, and we kept waiting and that was the reason for all the phone calls, and in two days he must have called me five to ten times. I said it isn't effective. Until it's out, I can't sell it to you. I said, once it's out, I will sell it to you. And, then, finally, it came out and when it came out of registration, he kept calling me, and I still hadn't heard that morning, and the stock was going wild and it just kept going up and up, and when it came out, it was booming, and I called him. In fact, he called me, I never called him at all, MacMillen. He just kept calling me because he wanted to buy the block.

So, when he finally called me the last time, I said I am effective. He said, what will you give me for it?

I said, stock is selling 14-3/4 - 7/8. What do you want for it. I said, make me a bid. He said, hold it. I will talk to Ross. Ross got on the phone, I was on one end, Ross on the other.

He said to him, I bought 44,000 from you at 14. He said right. I will never forget what Ross said because he restated--He says, I sold you 44,000 at 14, you bought 44,000, is that correct? And then, MacMillen yelled across "hit the bid" and I laughed because it was, you know, more or less the same business that I'm in, and understand the game and that was it. That was my entire conversation with him.

MR. DUFF: Could we establish for the record the date the registration statement became effective? I don't think that date has yet gone into evidence. It's been referred to in any number of ways but no date.

MR. BAYDA: The witness can answer that.

A I don't remember.

June 7, 1971.

Q With all of this explanation, specifically, did you say to Mr. MacMillen that your shares were included in a registration statement for disposition by you?

A Yes, because he--

MR. DUFF: The answer is yes or no.

A Yes.

Q Was this advice oral or was it written?

A Oral.

Q By telephone?

A Yes.

Q Do you recall whether Mr. MacMillen at any time asked you during any of these telephone conversations whether the stock was included in a registration statement?

A Yes, because he couldn't understand why I couldn't sell him the stock, and I kept telling him I can't sell it to you until it's effective, until I am out of registration.

Q I believe you testified that you did not speak directly with any other purchaser except for Faulkner, Dawkins and Sullivan?

A Yes, because mainly--

MR. DUFF: The answer is yes or no. The record may show that I spoke to the witness.

A Tobey & Kirk bought a thousand shares of the stock--of our stock so therefore I had spoken to them about the stock.

Q Tobey & Kirk purchased stock which they were offering on your behalf?

MR. DUFF: That is not what the witness testified to. They were a broker purchasing the shares. In what capacity or how, the witness can't possibly know. That is disclosed on Defendant Faulkner's Exhibit A.

A Do you know whether Tobey & Kirk was acting as a market maker in White Shield stock in June of 1971?

A I don't, no.

MR. DUFF: Would you care to define the term "market maker"? You have used it twice. I think I know what it means. I think the witness knows, but I would like the record to show that we are all speaking about the same thing.

Q Can you tell us what you understand by the term, market maker?

MR. DUFF: That doesn't tell us what you meant by the question.

MR. BAYDA: I don't believe I have to define the term, sir.

MR. DUFF: Then, I move to strike the answer because the question is ambiguous. The witness is free to answer your question as to what he understands it to mean, but I am not sure his

previous answer will therefore be a correct answer because I don't know and I am sure he doesn't know how you intend the question.

A Let me say this, if we are talking about them acting as a trader in the stock, then the answer is no. I don't think they were traders.

Q On or before the date that the registration became effective, had you advised anyone at Tobey & Kirk that this stock was included in a registration statement?

A Yes.

Q And this was Mr. Vin Ross?

A Mr. Ross and others. Mr. Ross primarily was going to handle the sale of the stock for me. He was my customer's man.

Q Do you recall the names of any of the others?

MR. DUFF: May I ask the relevance? If Tobey & Kirk knew, it knew because its partner knew. I don't see that anyone else matters.

A I don't remember the names. Their partners were all there when we were meeting with them about the sale of it.

Q Do you recall approximately when you advised

Mr. Ross that this stock was included in a registration statement?

A He had knowledge of it for six months.

Q Do you recall when you first advised him?

A The first time I knew the stock was going to be registered, which has got to be six months before, at least.

Q Was this advice given to him orally? Was it ever confirmed in writing?

A No, but we'd had many meetings with--not many but we had meetings with the attorneys for White Shield, the S.E.C., attorney for White Shield.

Q When you say, "we"--

A Mr. Byrnes and I.

Q And Mr. Ross?

A Mr. Ross was there. Mr. Knapp was the attorney for White Shield and the S.E.C.'s lawyer's name was--

MR. DUFF: Solomon?

A George Solomon.

Q Referring to Defendant Faulkner's Exhibit A for identification, I ask you to look at the lower half of the page. Did you know on or about the date that letter bears, June 14, 1971, that the

A I don't remember the exact date the stock was sold.

Q After the Singer & Mackie rejection, did you attempt to sell the stock rejected by Singer & Mackie in June of 1971?

A I don't remember.

Q July of 1971?

A I don't remember any time. Again, I don't remember the dates because I didn't handle any of this. I left it up to Mr. Byrnes and Mr. Ross and their lawyers and I stayed out of it.

Q Was the stock eventually sold?

A Yes.

Q You don't recall when it was sold?

A No. I can get the information for you, but I don't know. These the dates?

MR. DUFF: That's my recap of them.

A From February--no. August 16, 17, 24, 31, September 1st, 20, 21, 22, 23, October 5 and October 6.

Q And these dates were given in answer to the question concerning the stock rejected by Singer & Mackie?

A Yes, both--no, this is Faulkner. No.

Faulkner, Dawkins. Singer's was October 5 and 6.

Q How were the shares sold on October 5 and 6, identified as the stock rejected by Singer & Mackie?

A I don't know. Again, Mr. Tobey & Kirk--- their lawyers handled this whole thing.

Q Can you tell us how the stock sold on the other dates indicated was identified as the stock rejected by Faulkner, Dawkins and Sullivan?

A No, I cannot.

Q Prior to the June 7, 1971 agreement with Faulkner Dawkins and Sullivan, concerning the sale of your White Shield stock, and Mr. Byrnes' White Shield stock, did you advise anyone at Faulkner, Dawkins and Sullivan that you were waiting for a lett[illegible] from the Securities and Exchange Commission pertaining to the proposed sale of your stock, and Mr. Byrnes' stock?

A A letter?

MR. DUFF: To answer.

A No.

Q Can you tell us the names of the purchasers of the stock rejected by Singer & Mackie and Faulkner, Dawkins and Sullivan resold?

Exhibit "11" to Santangelo Affidavit---
Recapitulation of Santangelo's Resales---Omitted

Affidavit of Peter Landau, Submitted in
Support of Plaintiffs' Motion for Summary Judgment

CAPTION OMITTED

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

PETER LANDAU, being duly sworn, deposes and says:

1. I am an attorney at law admitted to practice in the courts of the State of New York, and am presently engaged in private practice in the City of New York. I submit this affidavit in support of the motion of the plaintiffs for summary judgment.

2. During June, July and August 1971 I was a member of the New York City law firm of Lawler, Sterling & Kent, outside attorneys for the counterclaim-defendant Tobey & Kirk. I specialized in corporate and securities law.

3. On or about June 15, 1971, I received an inquiry from my partner, H. Melville Hicks, Jr., regarding a rejection of a sizeable block of stock which Tobey & Kirk had attempted to deliver to defendant and counterclaim-plaintiff Faulkner, Dawkins & Sullivan.

4. Accordingly, I had meetings on June 15, 1971 with Mr. Vincent Ross, a partner of Tobey & Kirk, and another Tobey & Kirk employee in which I was filled in on the facts. My time sheets indicate that on or about June 16, 1971, I spoke by telephone with Marc Green, Esq., house counsel of Faulkner, who informed me that because of the Jaffee decision of the Securities and Exchange Commission, Faulkner, as a market-maker in the stock of White Shield Corporation, could not accept the stock which had been tendered by Tobey & Kirk because that stock was part of a registered distribution.

5. I expressed to Mr. Green my disagreement with his understanding of Rule 10b-6 and the Jaffee implications, and informed him that I would instruct Tobey & Kirk to redeliver the stock. Mr. Green responded that I would be making a serious mistake, and that if Tobey & Kirk redelivered the stock he would take the matter up with the Securities and Exchange Commission. He may also have suggested that we should jointly go down to the Commission. I told Mr. Green that the Commission does not involve itself in private disputes, and that I would give the matter further consideration.

6. At no time during that conversation did Mr. Green state, or in any way imply, that Faulkner was claiming a violation of Rule 10b-5, or that it claimed that either plaintiffs or Tobey & Kirk had misrepresented any fact, material or otherwise, in connection with the agreement of sale.

7. During this period, I was extensively engaged in some matters which frequently called me to California, so I was unable to give my full attention to Tobey & Kirk's legal problems. Accordingly, I suggested to Mr. Hicks that he refer the matter to one of the associates in our firm's Washington, D. C. office, Phillip N. Smith, Jr., and ask him to study the applicable law. I consulted with Mr. Smith on several occasions, and I believe Mr. Hicks also spoke to him from time to time. I also took the opportunity myself to re-read the Jaffee decision and study the applicability of Rule 10b-6 to the transaction in suit.

8. My time sheets indicate that on June 17, 1971 I had meetings and conferences with plaintiff Francis R. Santangelo, Vincent Ross and Anthony J. Cueva, partners of Tobey & Kirk, and several attorneys regarding the present controversy.

9. My time sheets indicate that I devoted two hours to "10(b)(6)" problems on June 18, 1971, and that on June 21, 1971, I had a one hour telephone conference regarding the Rule 10b-6 matters.

10. On June 22 and 23, 1971 I attended conferences with Messrs. Ross and Santangelo regarding the matter, and on June 29, 1971 I had a telephone conversation with Vincent Ross and Jerome J. Londin, Esq., an attorney for Mr. Santangelo.

11. My time sheets indicate a brief involvement with Rule 10b-6 matters on July 6, 1971, which were followed during the week of August 2 through 6, 1971, by about three hours devoted to the Rule 10b-6 matter, which included conversations with Phillip N. Smith. I believe that it was at that point that my firm advised Mr. Ross that there did not appear to be any hope that Faulkner could be persuaded to go through with the transaction, and that the plaintiffs should sell out the rejected stock.

12. I believe that the basis for our advice to Tobey & Kirk, that there was no realistic prospect of convincing Faulkner to go through with the deal, was that Mr. Green was purporting to base Faulkner's right to cancel upon Jaffee, a decision which contains quite a great deal of rather broad language. If I recall correctly, Mr. Green took the position that in view of Jaffee, Faulkner was obliged to cease its market-making activities ten days prior to purchasing free stock, so that it was not able to go through with the trade with Tobey & Kirk by simply removing itself from the Pink Sheets. I believed then, and I believe now, that this reading of Proviso 11 of Rule 10b-6(a) is completely incorrect, but it seemed to me that there was no likelihood that Mr. Green could be budged from the position he had taken, because such a reading of Rule 10b-6 in the light of Jaffee was not completely unwarranted---if the text and purpose of Rule 10b-6 were ignored. I had no real hope of persuading Mr. Green that he was mis-reading the Rule, because it seemed to me that Mr. Green seemed less interested in exploring the applicability of Rule 10b-6

than he was in finding a tenable basis for avoiding a sale which the decline in the market had made financially undesirable.

13. I have no record of having spoken to Mr. Green since June 15, 1971.

PETER LANDAU

Sworn to before me this
12th day of February, 1975.

DIANA DARLINGTON, Notary Public
State of New York, No. 03-5021230
Qualified in Bronx County
Certificate in New York County
Commission Expires March 30, 1976

Plaintiffs' Rule 9(g) Statement

CAPTION OMITTED

Plaintiffs and counterclaim defendants Thomas J. Byrnes and Francis R. Santangelo (hereinafter "plaintiffs") state, pursuant to the requirements of Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York, that the following facts are not contested:

1. All the facts set forth in a Stipulation of the Parties herein, dated February 13, 1975.

2. Prior to the transaction in suit, neither of the plaintiffs in fact knew of the per se rule promulgated by the Securities and Exchange Commission in Matter of Jaffee, Exchange Act Release No. 8866 dated April 20, 1970, reported in CCH Sec.L.Rep.

¶ 77,805, which held that the mere sale of a security in a registered distribution to a "market-maker" in that security makes the "market-maker" a participant in the distribution.

3. On various dates during and prior to 1971, White Shield Corporation ("White Shield") filed with the Securities and Exchange Commission four registration statements (or amendments to previously filed registration statements) all of which were declared effective during the first two weeks of June 1971, as follows:

(a) Registration Statement No. 2-35904, filed December 31, 1969, declared effective on January 22, 1971 "as of July 15, 1970", a post-effective amendment to which was declared effective on June 4, 1971, which registered 472,278 shares of common stock of White Shield held by F.O.F. Proprietary Funds, Ltd., and IIT, an International Investment Trust. The offering was not underwritten, and the stock registered thereby was to be offered to the public "from time to time". The prospectus of that post-effective amendment (which is dated June 3, 1971), is referred to as tne "Base Prospectus" (a complete copy of which is annexed to the Court copy of the Solomon affidavit sworn to February 10, 1975, and an excerpted copy of which, showing the cover and first five pages thereof, is annexed to all other copies of the court papers). The Base Prospectus was included in each of the other three prospectuses. Footnote 5 at page 5 of the Base Prospectus refers to the multiple registrations.

(b) Registration Statement No. 2-39346, filed with the Securities and Exchange Commission on February 3, 1971 was declared effective on June 4, 1971, and registered 559,000 shares of common stock, 259,000 shares of which were offered for sale by former shareholders of Automatic Toll Systems, Inc., merged into White Shield in 1969, and 300,000 shares of which were offered by White Shield. The distribution was underwritten by Leason & Co., and is referred to in the testmony and the papers as "the Leason secondary". Its prospectus (Exhibit "2" to the Solomon affidavit" is "wrapped around" the Base Prospectus.

(c) Registration Statement No. 2-40398, filed with the Securities and Exchange Commission on May 13, 1971, was declared effective on June 7, 1971, and registered 422,513 shares of common stock owned by twenty-seven individuals, including the two plaintiffs. The offering was not underwritten, and the stock was to be offered "from time to time" by individual selling stockholders through their brokers, members of the National Association of Securities Dealers, Inc. The prospectus of this registration statement (Exhibit "3" to the Solomon affidavit) is "wrapped around" the Base Prospectus.

(d) Registration Statement No. 2-40397, filed with the Securities and Exchange Commission on May 13, 1971, was declared effective on June 14, 1971 and registered 850,000 shares of common stock which were not then outstanding, representing the maximum number of shares issuable upon the exchange of certain securities of White Shield Leasing Corp. The offering was not

underwritten. The prospectus of this offering (Exhibit "4" to the Solomon affidavit) is "wrapped around" the Base Prospectus.

4. On or about June 1, 1971, plaintiff Santangelo, not knowing that defendant and counterclaim plaintiff Faulkner, Dawkins & Sullivan ("Faulkner") was a "market-maker" in White Shield stock, or in the "Pink Sheets" of the National Quotation Bureau, Inc., and having been informed by his broker, Vincent Ross of counterclaim defendant Tobey & Kirk ("Tobey & Kirk") that Faulkner was a big buyer of White Shield, telephoned an acquaintance, Jay Vanneck, head of the block trading department at Faulkner, to inquire whether Faulkner had any interest in purchasing approximately 44,000 shares of White Shield common stock. Vanneck advised Santangelo that he would have someone call back.

5. On or about June 1, 1971, and every single business day thereafter to and including June 7, 1971, Santangelo received calls from James MacMillen, then a trader at Faulkner, or from Ronald Lattuga, the trader at Faulkner in White Shield stock, seeking to purchase the stock which Santangelo said he would have for sale.

6. On each such occasion, other than one telephone conversation on June 7, 1971, Santangelo informed Faulkner's traders that he could not sell the stock because he was waiting for "SEC clearance" and he had not received such clearance. Santangelo also claims that he explicitly informed Faulkner, through its traders, that the stock he was offering to sell was in registration. On June 7, 1971, Santangelo informed MacMillen that "we are effective."

7. MacMillen admits that Santangelo told him he had stock in registration, and actually told him that if he would look in the prospectus, "you'll see my name."

8. For about a month prior to the sale in suit on June 7, 1971, Faulkner, through its two traders, Lattuga and MacMillen, knew that there would be at least one "secondary" in the stock of White Shield. MacMillen explictly stated that the secondary which he knew about was that which was going to be brought out by Leason & Co. Lattuga never identified the secondary of which he had knowledge, but implicitly it was the "Leason secondary".

9. MacMillen explicitly admits that he asked Santangelo whether the stock plaintiff was offering was part of the Leason secondary, and plaintiff truthfully informed him that it was not. MacMillen purported to understand that Santangelo nonetheless had stock which was part of the Leason secondary (which Santangelo did not in fact), and that the stock being offered to Faulkner was not part of that secondary, and, by inference, was not part of "any" secondary. He concedes, however, that Santangelo never used the word "any", but said the stock was not part of "the" secondary, necessarily, the "Leason secondary".

10. Lattuga denies ever having mentioned the "Leason secondary" by name, but after some equivocation, concedes that, regardless of which question Lattuga himself put to Santangelo, Santangelo's reply was that the stock was not part of "the secondary".

11. After Faulkner, on or about June 15, 1971, rejected delivery of the stock and prospectuses tendered to it on plaintiffs' behalf by Tobey & Kirk, its house counsel or compliance director, Marc Green, Esq., on or about June 15 or 16, 1971, had telephone conversations with Vincent Ross of Tobey & Kirk, and with H. Melville Hicks, Jr., Esq., and Peter Landau, Esq., (members of the law firm then representing Tobey & Kirk); on or about June 21, 1971, with Raymond Merritt, Esq., of Willkie, Farr & Gallagher, (then representing plaintiff Byrnes), and a meeting on June 21, 1971 with plaintiffs Byrnes and Santangelo, and with Mr. Ross. In none of these telephone conversations or at that meeting did Mr. Green suggest to any such person that plaintiffs might have misrepresented or omitted to disclose any material fact in connection with the sale of the securities in suit, or imply that plaintiffs had violated Rule 10b-5 or any other "fraud" provision.

12. In each such conversation, and at the meeting of June 21, 1971, it was Green's position that the transaction was unlawful by virtue of the "Jaffee rule" which had been enunciated by the Securities and Exchange Commission.

13. Green has testified that both at Faulkner and at his prior employment with Hayden Stone (which terminated on or about March 1, 1971), he had been aware of the Jaffee rule, and says that he had repeatedly cautioned the Faulkner traders that it is unlawful for a "market-maker" to purchase stock that is part of a registered distribution. However, Green admits that at no time did he instruct the traders or Faulkner's trading department,

to obtain copies of a "red herring" or preliminary prospectus with respect to known distributions of stock in which Faulkner is making a market, although he conceded that a prospectus customarily discloses the identity of selling shareholders in a registered secondary distribution.

14. Faulkner's traders have testified that at no time prior to the sale on June 7, 1971 did Faulkner have a copy of any "red herring" or preliminary prospectus applicable to any of the distributions of White Shield referred to above. Mr. Green could not categorically state that Faulkner had none, but stated that he had checked and "no one had it that I checked with."

15. Vincent Ross and Ronald Lattuga have testified that in the course of one conversation between them, Ross did offer to provide Lattuga with a copy of the prospectus. It is not clear, however, whether the conversation occurred prior to the sale on June 7, 1971, or after the sale but prior to the settlement date on June 15, 1971, or, therefore, whether it referred to a "red herring" or preliminary prospectus, or to the final "white" prospectus.

16. On June 23, 1971, Mr. Green of Faulkner informed Vincent Ross of Tobey & Kirk that the transaction was illegal, and Faulkner would not go through with the sale. On the preceding day, White Shield had made a public announcement that one of its major oil explorations off the coast of Sumatra had showed non-commercial quantities of oil, and the market price of White Shield stock dropped significantly after the announcement.

17. Singer & Mackie, Inc., the only other market-maker which cancelled a trade involving plaintiffs' stock and was a defendant herein before the complaint was dismissed against it for lack of subject-matter jurisdiction, cancelled its trade with Tobey & Kirk on or about June 16, 1971, only after it had first cancelled a trade with Faulkner, involving resale of 15,000 of the shares Faulkner had purchased from plaintiffs, and upon Faulkner's representation that plaintiffs and/or Tobey & Kirk were not delivering "clean stock".

18. Singer & Mackie, Inc. delivered to Tobey & Kirk copies of Official NASD Reclamation or Rejection Form #801, with respect to each trade for plaintiffs' account, and Tobey & Kirk duly notified Singer & Mackie in writing when it resold stock for Singer & Mackie's account.

19. Faulkner at no time sent Tobey & Kirk an Official NASD Notice of Reclamation or Rejection Form #801 with respect to any of the stock rejected by it.

20. Each of the plaintiffs resold the stock which had been rejected respectively by Faulkner and by Singer & Mackie, as set forth in the affidavits of the respective plaintiffs. In each case the plaintiffs resold stock first for the account of Faulkner, and only upon the completion of the resale of 22,000 shares of White Shield by each plaintiff for the account of Faulkner did he commence to resell 750 shares each for the account of Singer & Mackie.

Plaintiffs' Rule 9(g) Statement

Dated: New York, New York
February 14, 1975

CARRO, SPANBOCK, LONDIN, RODMAN & FASS
Attorneys for plaintiffs and counter-claim defendants Thomas J. Byrnes and Francis R. Santangelo

By _____
A Member of the Firm

10 East 40th Street
New York, New York 10016
Tel. (212) 889-3600

Tobey & Kirk's Notice of Motion for Summary Judgment

CAPTION OMITTED

S I R S :

PLEASE TAKE NOTICE that on the 17th day of April, 1975 at 2:00 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, the undersigned will move for an Order, pursuant to Rules 56(a) and 56(b) of the Federal Rules of Civil Procedure granting counterclaim-defendant Tobey & Kirk summary judgment for the reasons stated in the Notice of Motion

for Summary Judgment submitted by counsel for plaintiffs and counterclaim-defendants Thomas J. Byrnes and Francis R. Santangelo (hereinafter "Plaintiffs"). The said motion will be made at the same time as the Notice of Motion for Summary Judgment being moved by counsel for Plaintiffs before Hon. HENRY F. WERKER, United States District Judge, in the United States Courthouse, Foley Square, Borough of Manhattan, City, County and State of New York, and is made upon the Stipulation of the Parties dated February 13, 1975, heretofore filed with the Court, the affidavits of George J. Solomon, Esq., of plaintiff Thomas J. Byrnes, of plaintiff Francis R. Santangelo, of Peter Landau, Esq., and the exhibits numbered "1" through "9" inclusive, and "11" all of which were annexed to the Notice of Motion for Summary Judgment submitted by Plaintiffs and are incorporated herein by reference; and upon the Answers of Faulkner, Dawkins & Sullivan (hereinabove "Faulkner"), sworn to March 30, 1973, to Plaintiffs' Interrogatories, the depositions of Faulkner given by Ronald J. Lattuga and Marc R. Green, Esq., respectively, and the deposition of Tobey & Kirk, given by Vincent Ross, all of which have been filed with the Court; and upon the Complaint, the Answer and Counterclaims of Faulkner, the Reply and Counterclaims of the Plaintiffs and the reply of Faulkner thereto, all of which have heretofore been filed

with the Court; and upon all of the papers and proceedings heretofore had herein;

For an Order granting counterclaim-defendant Tobey & Kirk summary judgment dismissing the counterclaim against Tobey & Kirk.

PLEASE TAKE FURTHER NOTICE, that pursuant to Rule 9(c)(2) of the General Rules of the United States District Court for the Southern District of New York, defendant and counterclaim-plaintiff, Faulkner, Dawkins & Sullivan is required to serve answering or opposing papers upon the undersigned on or before the 3rd day of April, 1975.

Dated: New York, New York
March 6, 1975

Yours etc.
HALL, DICKLER, LAWLER, KENT & HOWLEY
Attorneys for counterclaim-defendants Tobey & Kirk
By _____
A Member of the Firm
460 Park Avenue
New York, New York 10022
(212) 838-4600

To:
CARRO, SPANBOCK, LONDON, RODMAN & FASS
Attorneys for plaintiffs and counterclaim defendants Thomas J. Byrnes and Francis R. Santangelo
10 East 40th Street
New York, New York 10016

Notice of Motion for Summary Judgment of Faulkner, Dawkins & Sullivan

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS J. BYRNES and FRANCIS R. SANTANGELO, Plaintiffs, -against- FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC., Defendants.	73 Civ. 670 H.F.W.
FAULKNER, DAWKINS & SULLIVAN, Counterclaim-Plaintiff, -against- THOMAS J. BYRNES, FRANCIS R. SANTANGELO and TOBEY & KIRK, Counterclaim-Defendants.	NOTICE OF MOTION FOR SUMMARY JUDGMENT

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Marc R. Green, Esq., sworn to the 10th day of March, 1975, upon the Stipulation of the parties dated February 13, 1975, and upon the pleadings and all other papers and proceedings heretofore had herein, including the entire discovery record, the undersigned will move before Hon. Henry F. Werker, United States District Judge, in the United States Court House, Foley Square, New York, New York, on the 30th day of May, 1975, at

2:00 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, for an Order, pursuant to Rules 56(a) and 56(b) of the Federal Rules of Civil Procedure, granting summary judgment to defendant and counterclaim-plaintiff Faulkner, Dawkins & Sullivan ("Faulkner") on the following affirmative defenses asserted by Faulkner in its Answer to the Complaint and on the following counterclaims, on the ground that there is no genuine issue as to any material fact and that Faulkner is entitled to a judgment as a matter of law, and for such other and further relief as the Court deems just and proper:

(a) Faulkner's second affirmative defense;

(b) Faulkner's third affirmative defense;

(c) Faulkner's fourth affirmative defense;

(d) Faulkner's fifth affirmative defense;

(e) Faulkner's seventh affirmative defense;

(f) Faulkner's eighth affirmative defense;

(g) Faulkner's ninth affirmative defense;

(h) Faulkner's first counterclaim asserted in its Answer to the Complaint herein; and

(i) Plaintiffs' counterclaim against Faulkner asserted in plaintiffs' Reply to Faulkner's counterclaims.

PLEASE TAKE FURTHER NOTICE, that you are required

to serve answering or opposing papers upon the undersigned on or before the 6th day of May, 1975.

Dated: New York, New York
April 11, 1975

JACOBS PERSINGER & PARKER

By: _____
A Member of the Firm

Attorneys for Defendant and
Counterclaim-Plaintiff Faulkner,
Dawkins & Sullivan
Office and P.O. Address
70 Pine Street
New York, New York 10005
Tel. (212)344-1866

Affidavit of Marc R. Green, Submitted in Support of Faulkner's Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment

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CAPTION OMITTED

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

MARC R. GREEN, being duly sworn, deposes and says:

1. I am an attorney employed by Faulkner, Dawkins & Sullivan, Inc., the corporate successor to Faulkner, Dawkins & Sullivan ("Faulkner"). This affidavit is respectfully submitted in support of Faulkner's motion for summary judgment and in opposition to the motion of plaintiffs and counterclaim-defen-

dants for summary judgment.

2. I affirm all of the statements made in my affidavit sworn to May 7, 1973 which was submitted in opposition to plaintiffs' earlier motion for summary judgment and other relief. A copy of my May 7, 1973 affidavit is annexed hereto as Exhibit A.

3. I have reviewed plaintiffs' Memorandum of Law submitted in support of their summary judgment motion, in which they seek to impugn Faulkner's motives for cancelling the June 7, 1971 sale of 44,000 shares of common stock of White Shield Corporation. The fact is, as stated in my May 7, 1973 affidavit, that the said sale was cancelled upon my instructions, because the transaction was illegal, and not to enable Faulkner to cover any alleged short position in the White Shield stock at a better price as plaintiffs suggest in their Memorandum (pp. 104-108).

4. I have reviewed Faulkner's records of trading in the White Shield stock during June of 1971. The fact is that Faulkner did not have a short position in the White Shield stock at any time during June 1971 until June 15, 1971, and the short position on that day resulted solely from (a) the cancellation of the purchase of the 44,000 shares of White Shield stock from Tobey & Kirk on June 7, 1971 and (b) the cancellation of the

resale of 20,000 of such shares to Singer & Mackie, Inc. and Mitchum, Jones & Templeton, Inc. As a result of those cancellations, Faulkner's short position on June 15, 1971 amounted to 712 shares. That short position was covered by a purchase of 712 shares on June 21, 1971 at a price of 11 5/8 per share.

Marc R. Green

Sworn to before me this
[illegible]day of March, 1975

Notary Public

ROBERT E. POWERS
Notary Public, State of New York
No. 24-8426550
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

Exhibit "A" to Green Affidavit---Affidavit of Marc R. Green sworn to May 7, 1973---is Set Forth as Exhibit "5" to Depositions, post, p.

Q Were there any communications between Mr. Byrnes and yourself or anyone else employed by Tobey & Kirk pertaining to the sale of the 68,400 shares sold by Tobey & Kirk on his behalf?

A I answered.

MR. LANDAU: Can we take a five minute break?

MR. BAYDA: Sure.

(Short recess.)

MR. BAYDA: Will the reporter read back the last question and answer?

(Record read.)

A Yes.

Q Was there one such communication or more than one?

A More than one.

Q When was the first? Approximately.

A It could have been several months-- several months prior to the sale of the securities.

Q And that was a communication to you?

A Yes. We had the discussion on the sale of the securities. That they would be coming up for sale upon the registration by the SEC.

Q Was this communication oral or was it in writing?

A Oral.

Q Was anyone else present at the time?

A No.

Q When was the next communication?

A I can't answer those questions. Tom and I are friends and we talk every day.

MR. LANDAU: He is asking a specific question.

A I don't know.

MR. LANDAU: To the best of your recollection.

Q Are there any memoranda or letters or any other writings pertaining to any of these communications?

A Pursuant to the sales, you mean?

Q Pertaining to the sales.

A No.

MR. LANDAU: Would you try and clarify that question? For me, anyway.

MR. BAYDA: Okay.

MR. LANDAU: Are you asking whether any other communications, written communications, relating to the sale or written memoranda relating to the oral communications surrounding the sale? I am not--

MR. BAYDA: Well, the question would en-

compass both. If any of the communications were in writing.

MR. MARSHALL: Can we receive an answer on that question and go on?

MR. DUFF: What was the question.

MR. MARSHALL: Read the question back.

(Record read.)

MR. BAYDA: I reserved on just about everything else.

I would like to ask about communications by the other three principals, and then if we can go into the documents. If there are any.

MR. LANDAU: Go ahead.

Q Other than the instructions given by Mr. Santangelo, were there any other communications by him to you or to anyone at Tobey & Kirk pertaining to the sale of his registered stock?

A I think the answer is the same as to Mr. Byrnes. Mr. Santangelo and I are friends, and we communicate and talk almost every day.

There were many communications.

Q Pertaining to the sale of his registered stock?

A To the sale of the securities, yes.

Q And when was the first such communication?

A I had discussed it with him like with Mr. Byrnes several months before, that we would be selling some securities in White Shield upon the registration of the securities, when and if and how we didn't know until they were registered and we were free to sell them.

Q This was an oral communication?

A Yes.

Q And were there subsequent communications pertaining to the same subject matter?

A Yes.

Q Was anyone else present during the time of any of these communications?

A Sure. Yes.

Q Who was present at any of these, during the course of any of these communications?

A I couldn't answer that.

Q You don't recall the name of anyone who was ever present during the time of any of these communications between Mr. Santangelo and yourself?

MR. DUFF: Mr. Bayda, I think the witness' testimony is plain that he has had virtually daily contact with Mr. Santangelo. His last answer must be presumed to refer to fact that these conversations were not always held in a telephone booth where they

were alone and there were no others present and that he obviously is stating to you that he has no recollection with respect to any such meeting as to who might be present.

What more you want from him, I really don't know.

Q Is that the witness' answer?

A That's exactly my answer.

Q Aside from the instructions given by Mr. Pederson, were there any communications by him to you or to anyone else employed by Tobey & Kirk pertaining to the sale of his registered White Shield stock?

A I think-- yes, we had many communications, yes.

Q And when was the first?

A I couldn't tell you.

Q Can you tell us approximately when the first such communication occurred?

A No, I couldn't. Mr. Pederson likewise is a friend of mine, and I have contact with him socially and on other business matters many times during the course of a week.

Q Were all of these communications by Mr. Pederson oral?

A Yes.

Q Can you tell us the substance of any of the communications by Mr. Pederson to yourself?

A Sell the stock.

Q And that was it?

A He would ask the price, I would give him the quote, and he would say to sell, or not to sell it, period.

Q Did Mr. Pederson tell you that the stock was included in a registration statement?

A I knew it was.

Yes.

Q Aside from the instructions given by Mr. Draddy, were there any communications by him to you or to anyone else employed by Tobey & Kirk pertaining to the sale of his registered White Shield stock?

A Yes.

Q And when was the first such communication?

A I couldn't tell you. I don't know.

Q Was there one communication or more than one?

A Several.

Q Were all of them oral?

A Yes.

Q And can you tell us the substance of any of the

communications by Mr. Draddy?

A No. I can't recall.

Q Did Mr. Draddy tell you that his stock was included in a registration statement?

A Yes.

Q I would like to ask again now, are there any memoranda, letters or other writings pertaining to any such communications by any of the four principals named, that is, Mr. Byrnes, Mr. Santangelo, Mr. Pederson or Mr. Draddy?

A Yes.

Q Do you have them with you?

A I have them.

Q Will you produce them?

A Off the record.

(Discussion off the record.)

A Just change it to no.

The answer to the last question is no.

MR. LANDAU: Off the record.

(Discussion off the record.)

Q On or about June 7, 1971, did you speak to anyone at Faulkner, Dawkins & Sullivan concerning the sale of White Shield Corporation stock to it?

A Yes.

Q Who did you speak with at Faulkner?

A Jim MacMillan.

Q Was there one conversation with Mr. MacMillan or more than one?

A More than one.

Q When was the first such conversation? If you recall.

A That I can't honestly say.

MR. DUFF: Can you place it as morning, afternoon?

A Well, on the 7th I talked to him twice in the morning.

MR. DUFF: Excuse me, that was what you were referring to, wasn't it?

MR. BAYDA: Yes.

Q Were these conversations both by telephone?

A Yes.

Q Was an agreement reached with Mr. MacMillan in one of these telephone conversations?

A What do you mean by an agreement?

Q I am referring actually to an agreement to sell to Faulkner White Shield stock.

A Yes.

Q Was this agreement reached in the first telephone

conversation or the second?

A The second.

Q Who initiated the first telephone call?

A Mr. MacMillan.

Q And who initiated the second telephone call?

A Mr. MacMillan.

Q Can you tell us the substance of the first telephone conversation?

A He wanted to know if we would sell him a block of White Shield stock, and at the time I informed him that we couldn't sell it to him because we had not received word from company's counsel.

Q Was anything else said in that telephone conversation?

A Not that I recall.

Q And what was the substance of the second telephone conversation?

A There may have been three.

The second one, if I am correct, that the stock was, had been cleared, and we had been informed by company counsel that it was all right to sell it. And that we informed him that there possibly could have been another bidder who we had committed, and I needed a half an hour before we could sell it to him, to give the other bidder

a chance.

And it was agreed that we would call him back in fifteen minutes to a half hour, or he would call us back.

And that was the end of that conversation.

Q Was there a third telephone conversation during the morning of the 7th or the afternoon?

A It may have been ten after twelve or twelve-fifteen.

Q What was the substance of that conversation?

A At that point, the time had elapsed, and he called me, and I informed him that I wasn't going to wait any longer for the other, and that we would sell him a block of stock.

Q Are there any writings or memoranda pertaining to or reflecting any of these telephone conversations?

A N t that I recall.

Q Are there any writings or memoranda or other documents pertaining to the agreement reached with Mr. MacMillan?

A No. I don't think a sale of securities is an agreement.

Q Well, was, specificslly, was there a confirmation of the transaction sent to Faulkner?

MR. DUFF: Are you referring to what is

called a comparison in the trade?

MR. BAYDA: Right.

A Yes. There was, definitely.

Q Do you have a copy of it?

A Yes.

Q Will you produce it?

A Yes.

The top.

MR. BAYDA: Can we have this marked as Defendant Faulkner's Exhibit B for identification?

This appears to be a xerox copy of two documents, one is headed with the name Tobey & Kirk, and the date of transaction is shown to be 6-7-71, date of settlement, 6-14-71, description of security, White Shield Corp., quantity doesn't appear.

Well, it's just a xerox.

MR. DUFF: Quantity does appear on the side, but a portion of it didn't show through.

Off the record.

(Discussion off the record.)

MR. BAYDA: Broker to whom sold, name is Faulkner, Dawkins & Sullivan. Price, fourteen.

(Xerox copy of two documents marked Defendant Faulkner's Exhibit B for identification, as of this date.)

Q Does Tobey & Kirk keep copies of comparisons sent to others, other brokers in the regular course of its business?

A Yes.

Q And this is a photocopy kept by Tobey & Kirk in the regular course of its business?

A Yes.

Q When was that Tobey & Kirk comparison sent to Faulkner?

A On the 7th, I believe.

MR. DUFF: That's June 7, 1971?

A 1971, right.

Q How was it sent, by mail, by messenger?

A Normally they go through the mail. This possibly could have been sent by messenger. I couldn't really answer that.

Q Was a comparison of the trade which you made with Mr. MacMillan from Faulkner received by Tobey & Kirk?

A Yes.

Q When was that received?

A Either the date on the 8th, or the 9th, I believe.

MR. DUFF: Off the record.

(Discussion off the record.)

the number 44,000appears. Under "Description," the name White Shield Corp., .05PV this firm makes a market in this security.

(Photocopy of comparison form addressed to Faulkner, Dawkins & Sullivan, marked Defendant Faulkner's Exhibit C for identification, as of this date.)

Q Aside from the comparisons, are there any other writings, letters or memoranda pertaining to that transaction with Faulkner on June 7, 1971?

MR. BAYDA: This appears to be a photocopy of a comparison form, at the top the firm name Tobey & Kirk, quantity doesn't appear on xerox. Description of security is White Shield Corp. Price, fourteen. Date of transaction, 6-7-71. Date of settlement, 6-14-71.

Will you mark this Faulkner's Exhibit D for identification?

(Photocopy of comparison form with the name Tobey & Kirk at the top, marked Defendant Faulkner's Exhibit D for identification, as of this date.)

Q I would like to ask the witness to read the handwriting there, because I can't quite make it out.

A Which handwriting?

Q Anything other than the print. Or the typed.

A You mean up above here, this mark, right up here?

Q I can't quite see it from here, it looks like initials.

A This is what you want to know?

Q All right. Anything that is, that appears to be handwritten on there.

Would you just read it in? Because I can't make it out.

A Well, down below, next to Faulkner, Dawkins & Sullivan, there is initial "D.K." Any question, call Mark Green F.D.S.

On the top of the comparison, is a stamp, 1971, June 16, 11:50 a.m., with the initials A.S.C. next to it. Which is when this was received at Tobey & Kirk.

MR. DUFF: Has it been marked yet?

MR. BAYDA: Yes.

MR. DUFF: By this you are referring to Defendant Faulkner's Exhibit D for identification.

A Yes, sir.

Q Refer to Defendant Faulkner's Exhibit B for identification, the photocopy of the Tobey & Kirk comparison.

Was a prospectus of White Shield Corporation delivered to Faulkner with that comparison a copy of which we have

marked as Exhibit B?

A No.

Q What was the answer?

A No.

Q Was a prospectus of White Shield Corporation delivered to Faulkner prior to the delivery of that comparison?

A No.

Q In the ordinary course of business of Tobey & Kirk, if securities included in a registration statement are sold, is a prospectus delivered to the customer with the comparison or confirmation of the sale?

MR. DUFF: Objection to the question. It has two questions in it.

One is with the comparison, and the other is with a confirmation.

MR. BAYDA: Let's take them one at a time.

Q In the ordinary course of business of Tobey & Kirk, if securities included in a registration statement are sold to a broker or dealer, is a prospectus delivered to the purchaser with the comparison?

A Sometimes.

Q What would determine whether or not a prospectus is delivered?

A Printer.

Q Can you be more specific?

A This registration just became effective on the 7th. And it would take the company several hours, at least, if not a day or two, to have the final prospectus completed in order to be delivered to the purchaser.

Q Was a prospectus ever sent to Faulkner by Tobey & Kirk?

A Yes.

Q When was that?

A I believe previous to the delivery of the securities, and with the delivery of the securities.

Q With respect to the first delivery of the prospectus, who was it that sent the prospectus to Faulkner? The name of the individual.

A I sent them over. But who delivered them, I wouldn't know. One of our runners.

Q Do you recall the date on which you sent them over?

A No. Prior to the delivery date, which was the 14th, I believe.

Q Was there any transmittal accompanying the delivery of the prospectus on the first delivery?

A I don't believe so.

the June 7, 1971, prospectus were received by Tobey & Kirk?

A I don't have the date.

Q Does Tobey & Kirk have records which would show when those prospectuses were received?

A They would show when they were used, not necessarily when they were received.

Q When you say used, do you mean delivered?

A That's right.

Q Do you have those records with you?

A No.

MR. LANDAU: Off the record.

(Discussion off the record.)

Q Do you have the records which show when the prospectuses were used?

A Yes. On the delivery tickets it would show that the prospectuses went along with the securities, and the delivery on the delivery.

Q Well, are there any records showing delivery of prospectuses prior to the delivery of the securities?

A No.

Q Prior to the delivery of the June 7, 1971, prospectus to Faulkner, was there any red herring preliminary prospectus delivered to Faulkner?

A No.

MR. LANDAU: By Tobey & Kirk?

Q By Tobey & Kirk.

A No.

Q Was there any red herring preliminary prospectus delivered to any of the purchasers of the 160,000 registered shares sold by Tobey & Kirk in June of 1971?

A No.

Q Delivery by Tobey & Kirk.

A None.

Q Do you know if there was in existence any such preliminary red herring prospectus?

A Yes.

Q Was any such preliminary red herring prospectus received by Tobey & Kirk prior to June 7, 1971?

A Yes.

Q Do you have a copy of any such red herring prospectus?

A Yes.

Q Would you produce it?

MR. BAYDA: I would like to have the first five pages of this marked as the next exhibit for identification.

MR. DUFF: That's a red herring dated when?

ready testified he has no recollection of any personal communications between him and anyone at Suez American.

I don't know how this question follows from than answer.

Q You may answer.

A I don't know.

Q Do you know if anyone at Tobey & Kirk gave such advice to Suez American Corporation?

A No.

Q Aside from the comparisons, are there any other writings or documents pertaining to the transactions on June 8, 1971, with Suez American Corporation?

A Not that I know of.

Q Did you know on June 8, 1971, and prior to the trades with Suez American Corporation, that that firm was entering bid and asked quotations in the pink sheets?

A Yes.

Q Was any commission or other compensation paid to Tobey & Kirk with respect to the trades, the sales to Suez American Corporation?

A Yes.

Q Who paid it?

A Customers.

Q What was the amount of that commission or compensation?

A Normal Stock Exchange commission.

Q When you say the customers, are you referring to both the seller and the buyer or either?

A The seller.

Q Was any other consideration paid or given to Tobey & Kirk with respect to these trades to Suez American Corporation?

A No.

MR. DUFF: He said only the normal.

(Question read.)

MR. DUFF: Was that your question? Then I object to the form of the question, because it doesn't say by whom.

A Do you want me to rephrase my answer?

MR. LANDAU: No. Let's go back someplace.

MR. DUFF: What was the question?

(Question read.)

MR. LANDAU: Was any other compensation paid in connection with the transaction other than the normal Stock Exchange commission that he said was paid.

MR. DUFF: And then there was added, to Suez

American. That's where I am having difficulty.

How can this witness testify as to what was paid to Suez American by anyone other than--

MR. BAYDA: No. The sales to Suez American Corporation.

MR. LANDAU: That clarifies it.

Q Are there any records of any commissions or compensation or other consideration paid or given to Tobey & Kirk with respect to the sales to Suez American Corporation?

A Yes.

Q Do you have them with you?

A They would show on the customers' statements which we have already stated we are going to furnish you.

Q Referring again to Defendant Faulkner's Exhibit A for identification, the second purchaser named, F.I. duPont, Glore Forgan, 700 shares.

When was that sale made?

MR. DUFF: You're going to be furnished with the tickets, Mr. Bayda.

MR. LANDAU: Off the record.

(Discussion off the record.)

Q I think we have covered Suez American Corporation.

A Off the record.

A These would come back with the stock, I am sure.

MR. DUFF: You are assuming you received them that day.

A That's right.

Q Aside from the rejection forms, were there any other communications between Singer and Tobey & Kirk pertaining to the rejection?

A Yes.

Q What were they?

A Off the record.

(Discussion off the record.)

A Jim Mullan, Singer & Mackie, called me and said that they are returning this stock, that any questions should be taken up with Arthur Borden of Borden & Ball.

Q When did Mr. Mullan call you?

A I don't have the date.

Q Approximately when did he call you?

A Sometime in June. Or I would believe around the 17th.

Q Was it prior to the time that you received the stock back from Singer & Mackie?

A I don't know.

Also, on September 17, and September 28, a Mr. Lawrence

Beatus, Jr., partner of Tobey & Kirk, wrote two letters to the managing partner of Singer & Mackie, concerning this 1500 shares, which we will present as exhibits, with carbon copy to--

MR. LANDAU: It will speak for itself.

A Arthur Borden of Borden & Ball, and Peter Landau, of Lawler, Sterling & Kent.

Q Are there any writings or memoranda relating to the telephone conversation between yourself and Mr. Mullan?

A Just small handwritten note that he had called me.

Q Do you have that with you?

A Yes.

Q Will you produce that?

MR. BAYDA: Can we have these marked as the next three exhibits for identification.

First is on the letterhead of Tobey & Kirk, dated September 17, 1971, addressed to Singer & Mackie, over the signature of the name typed under in the signature Lawrence Beatus, Jr.

(Document on letterhead of Tobey & Kirk, dated September 17, 1971, to Singer & Mackie, marked Defendant Faulkner's Exhibit I for identification, as of this date.)

A I would prefer not to answer that question.

MR. DUFF: It's not a question of preference, it's a question of whether you feel you're able to answer it.

MR. LANDAU: Are you able to answer that question or not?

If not, say you're not.

A The way the question is worded, I would say I am not able to answer that question.

Q More specifically then, did Mr. Santangelo give you any instructions pertaining to the shares rejected?

A I still say the way the word "instructions" is worded into that question, I can't answer it.

Q Did Mr. Santangelo ask you to sell out the shares rejected?

A Yes, he did.

Q When did he ask you to sell out the shares rejected?

A When it finally became evident that through the efforts of the attorneys on both sides that there was no possibility of a settlement or completing of this transaction.

Q And when was that, sir?

A Sometime around August.

Q What were the circumstances by which it became evident?

A Circumstances arose after the meeting at Faulkner's office, upon the conclusion of said meeting we were told by Faulkner that if there was any way that this transaction could be completed, it would be.

And it wasn't until sometime in August, as I recall, that this was evident that nothing could have-- no efforts to conclude this transaction would work.

Q Who at Faulkner said that if there were any way that it could be done it would be?

A Mr. Green. And I believe the gentleman who I previously stated I couldn't recall his name, who was introduced as a partner and officer of Faulkner.

MR. DUFF: Would you recognize the name of that gentleman if it were given to you?

A I could. I think it was an Italian name.

Q Would it be Jack Cirenza?

A I believe that is the correct name, yes.

Q What were the intervening events between that meeting which you testified occurred on June 21, 22, or 23, of 1971, which made it evident that nothing could be worked out?

A These were between Faulkner and the attorneys for Faulkner, Lawler, Sterling & Kent, at which I was not present or a party to.

Q Are you referring to meetings between representatives of Faulkner, and representatives of Lawler, Sterling & Kent?

A I don't know whether they were meetings or telephone conversations or communications.

Q Do you know when they occurred?

A No, I don't.

Q Do you know who acted on behalf of Faulkner?

A No, I don't.

Q Do you know who acted on behalf of Lawler, Sterling & Kent?

A It would either be--

MR. DUFF: Do you know?

MR. LANDAU: Yes or no.

A I believe Mr. Landau. Or one of his other partners. Or associates. In New York or Washington.

Q After the Faulkner rejection, were there any instructions given to Tobey & Kirk by Mr. Byrnes?

A Yes.

Q Pertaining to the shares rejected?

A Yes.

Q Do you recall the substance of the conversation with Mr. MacMillan?

A Substance being that we had some stock for sale, and that I had learned that they had been the purchaser or an interested buyer in the stock previous to the 7th, and that is how this whole thing came about, and that naturally was what we discussed.

Q Did Mr. MacMillan in the course of that conversation offer to purchase any shares of White Shield from Tobey & Kirk?

A Yes.

Q What was your response to that offer?

A Response that we could not sell him the stock because it was still in registration.

Q Did you in the course of that conversation offer to give Mr. MacMillan a copy of the red herring prospectus, which was marked Defendant Faulkner's Exhibit F for identification?

A I offered to give him a copy of the herring, the copies of the herring, whether it was that conversation or one that I had previous to the 7th, and he told me that he didn't need one, because they had already had one.

Q This being?

A Faulkner, Dawkins & Sullivan.

Q Y·u testified just now that you had more than one conversation.

A Yes.

Q To the best of your recollection, your second conversation involved what subject?

A The purchase of the stock.

Q Did Mr. MacMillan offer to purchase the stock from you?

A Yes.

Q And what was your response to that?

A Yes.

Q Do I understand that you agreed to sell him the stock on that second conversation?

A No. I didn't agree to sell him the stock.

Q Then your answer was not yes.

A Question was, did he offer to purchase the stock.

Q And to that you answered yes?

A Yes.

Q And I ask you then what was your response to that offer?

A As I stated, that I could not sell the stock because it was still in registration.

Q Now, you testified, I believe, that you had two

or three conversations with Mr. MacMillan on the 7th of June.

A That's correct.

Q At the time of those three conversations, where were you physically located?

A I was in the office of Mr. Santangelo, in the morning, early in the morning.

Q Now, did you or Mr. Santangelo or anyone else present in his office place the call to MacMillan or did Mr. MacMillan call Mr. Santangelo's office?

A I believe that he called Mr. Santangelo's office.

Q Did he have a conversation with Mr. Santangelo on the occasion of his first telephone call?

A I believe so, yes.

Q Do you recall what Mr. Santangelo told him in the course of that first conversation, to the best of your recollection?

A I believe Mr. Santangelo's statement was the stock couldn't be sold because it was not freed up.

Q That is the substance of what Mr. Santangelo said in the course of that first conversation?

A That's correct.

Q Then there was a subsequent conversation, is

that correct?

A That's correct.

Q And was that also a call placed to Mr. Santangelo by Mr. MacMillan?

A That I couldn't be sure of, whether Mr. Santangelo called Mr. MacMillan or Mr. MacMillan called Mr. Santangelo.

Q All right. But however the call was placed, what was the substance of that conversation from the portion of it you heard?

A That they had received word from the attorneys for White Shield that the stock was out of registration and could be traded.

Q All right. And was there any further conversation at that time?

A Mr. MacMillan wanted to purchase the stock. And, as I previously stated, that the stock-- that there-- excuse me-- that they possibly had a commitment to another purchaser and they had to wait fifteen minutes to a half hour until they were sure that the other purchaser was not going to take up the stock.

Q And that's how that conversation ended?

A That's correct.

Q All right, sir.

A I just-- I, my recollection is that Havenfield couldn't quite make up their mind whether they wanted to buy it or not.

Q Was price discussed?

A I am sure there was, yes.

Q All right. But then ultimately the answer from Havenfield was no; is that what you have testified to?

A I can't quite definitely say that it was no. But I think we had made a commitment to come back to Faulkner within fifteen minutes to a half hour, and at a certain point I believe during this, Mr. MacMillan called back and at that point Mr. Byrnes forgot about Havenfield.

Q When Mr. MacMillan called, to whom did he speak?

A He called Mr. Santangelo first.

Q And what did Mr. Santangelo say to Mr. MacMillan?

A He said that we would sell them a block of stock.

Q Did you participate in any phone conversation at that time?

A Not that I recall, no.

Q Mr. Santangelo testified that after he had spoken with Mr. MacMillan, he said hold on, I'll put Vin Ross on.

A I don't believe that's right. I believe Mr. MacMillan called me.

Q Well, you were at Mr. Santangelo's office?

A That's correct.

Q Was the call routed from your office to Mr. Santangelo's office?

A That's correct.

Q Is that what happened?

A Yes, sir.

Q What was the conversation between you and Mr. MacMillan?

A Mr. MacMillan called, and said he would like to purchase the stock. I asked him what the market was. He gave it to me.

Q did he give you?

A I believe it was 14-5/8, 7/8 or 14-3/4, 15. I said we had a block for sale, and I asked him to give me a bid.

Q Did he give you a bid?

A He did. He bid 14, for 44,000 shares.

Q And what was the form of words he used?

A We bid 14 for 44,000 shares.

Q What did you say?

A I said I'll sell you 44,000 shares at 14.

Q Is that the end of the conversation?

A I repeated it, to be sure that it was correct. And that was the end of the conversation.

Q All right.

A And I believe also he, upon concluding that he had purchased and I had sold, he yelled out across the room, hit the bid.

Q Hit the bid?

A Yes, sir.

Q Is that a term of art in the brokerage community?

A Meaning that the bid at that time in the market was 14-5/8, or 14-3/4, that meant for traders to start selling the stock.

Q That he had just purchased from you?

A That's correct.

Q Now, you testified also, I believe, that you had had discussions with Leason & Company. Is that correct?

A Yes, sir.

Q Did you in the course of your discussions prior to Leason, offer them a red herring prospectus?

A No, I didn't.

Q Was there any reason why you didn't?

A Well, I think Leason had just underwritten the company's secondary, or whatever you would call it, and

that he was very well aware of everything that was going on in White Shield at this time.

Q Do you have any knowledge as to whether in connection with any of the sales by Tobey & Kirk of the stock of White Shield a preliminary red herring prospectus was offered to any broker or dealer with whom you were negotiating a sale of stock?

By "you" I mean Tobey & Kirk.

A May I have that question repeated, please?

(Question read.)

A No.

Q To the best of your knowledge, in the case of any shares of White Shield sold by Tobey & Kirk for the plaintiffs, was a final prospectus or copies of a final prospectus delivered to the purchasing broker at or prior to the delivery of the stock?

A Yes. Every purchasing broker, or customer--

Q Well, I confine myself solely to the brokers in my question.

Q Every purchasing broker at the time or in some cases prior to received several prospectuses with the delivery of the securities.

Q You testified that there came a time when Faulkner, Dawkins & Sullivan indicated that they would

not accept delivery of the stock.

A Yes, sir.

Q Did you personally have any conversations with anyone at Faulkner prior to the meeting of June 21, 22, or 23?

A Yes.

Q With whom did you speak, sir?

A I can't recall.

Q Did you attempt to speak with Mr. MacMillan?

A No. I don't believe it was Mr. MacMillan, it possibly could have been, I just don't remember who I spoke with.

Q What was the substance of that conversation?

A Somebody, whoever it was, at Faulkner, called one evening around six or nine o'clock, or six-thirty, with some questions on the prospectus, they were going over it.

Q Do you recall what the questions were?

A Well, they were questioning whether it was shelf registration or secondary or they wanted to know exactly what the situation was.

Q What do you understand by the term "shelf registration"?

A I had been informed by the company that this

was not a shelf registration, but technically this was a sort of a special situation which was defined as an uncoordinated wraparound registration of securities.

Q How did the meeting of June 21, 22, or 23 occur; if you know?

A I believe it occurred at the request of Mr. Byrnes and Mr. Santangelo through their friend Vanneck.

Q Now, you have testified previously that Mr. Green said at that meeting that if there was any way for Faulkner to take the stock, they would try to do so. Is that correct?

A Yes, sir.

Q What did you do next after leaving that meeting, in connection with this transaction?

A There was nothing I could do until we had heard from Faulkner.

Q Well, were you expecting to talk to Faulkner yourselves or were you leaving it to someone else to do that?

A Our attorneys had been informed, and I believe they had been in contact with Mr. Green, and that they were having their own conversations back and forth.

Q I show you a document and ask you if you are able to identify it.

A Yes. This is a copy of a memorandum which states on Tobey & Kirk's letterhead re White Shield, prospectus enclosed. If more desired, please contact Tobey & Kirk 422-8030, thank you.

This document was--

Q I just asked you if you were able to identify it.

A Yes, sir.

Q Was that document, is the document you have before you a copy or is it one of a reproduced group of documents?

A This is a reproduction.

Q What was the form of the original of that document? Was it a typed letterhead or was it a mimeographed or otherwise mass reproduced document?

A It was typed on a sheet of Tobey & Kirk letterhead, and then photocopied through the xerox machine.

Q To whom, if you know, was that document delivered?

A This document was delivered to all the purchasers, with the delivery of the securities, and the prospectuses.

Q Are you referring now to the securities of White Shield?

A Yes, sir.

Q And the prospectuses.

MR. DUFF: I ask that that be marked Plaintiffs' Exhibit 1 for identification.

(Copy of letter on letterhead of Tobey & Kirk, re White Shield, marked Plaintiffs' Exhibit 1 for identification, as of this date.)

Q Mr. Ross, after the matter had been turned over in effect to your attorneys, Lawler, Sterling & Kent, did you keep track of what developments, if any, there were in discussions with Faulkner, Dawkins & Sullivan?

A Yes, I did.

Q Were you being pressed by the plaintiffs as to what developments there were?

A Yes.

Q And what did you do in connection with their pressing you?

A I told them that Lawler, Sterling was working on that, and were in contact with Faulkner, and there was nothing I could do, or would get in the middle of discussions between lawyers.

Q What did you do by way of finding out what Lawler, Sterling was doing at the time?

A I was in contact with Mr. Hicks every day or so, and just asked him if there was any new developments.

Q What were you informed from him?

A I was informed that there was nothing up until the time that it was decided that this situation was not going to be ironed out and we might as well go ahead and sell the stock.

Q I think you have testified previously that you were advised on or about August 9th that there was no hope. What was the nature of that advice, and from whom did it come?

A I believe it came from our attorneys.

Q Did they specify in any manner what it was that persuaded them that there was no hope of working this out?

A No.

Q Had there been any prior discussions between you and the plaintiffs regarding selling out this stock, in the course of the summer of 1971?

A Not that I recall. But just that they wanted to get it sold out. We didn't sell any because we were waiting for our answer.

Q I asked if there was any discussion.

A Yes.

Q What were the market conditions in the stock of White Shield during the course of the summer?

A The stock was depressed, and there was not any

sizable bids in the stock around the summer months.

Q In fact, the stock fell right after the sale to Faulkner, did it not, sir?

A Yes, sir.

Q Did there come a time when you received sticker amendments to the prospectus covering the shares being sold by the plaintiffs?

A Yes, sir.

Q Was that-- when approximately was that?

A Within a day or two or three after the sale. To Faulkner on June--

Q Was there one or more sticker amendments?

A I believe there was two.

Q All right.

Do you recall receiving a sticker amendment dated-- do you have a copy of a prospectus with sticker amendments?

A We had one here, but I believe that the other counsel for Lawler, Sterling & Kent left with it.

MR. LANDAU: Do you want to know the date of that sticker?

MR. DUFF: I know it was June 18.

MR. LANDAU: Off the record.

(Discussion off the record.)

Q Do you recall whether one of the sticker amendments, specifically the one dated June 18, 1971, contained the following language or language substantially similar, and I quote:

"By virtue of its acting as broker on behalf of Messrs. Thomas J. Byrnes, Vincent Draddy, Peer T. Pederson and Francis R. Santangelo, in connection with their sale of approximately 145,000 of the shares offered hereby, Tobey & Kirk, 52 Wall Street, New York, New York, may be deemed an 'underwriter' as that term is defined in the Securities Act of 1933."

A Yes, I believe that is the wording that was used in the sticker. One of the stickers.

Q Do you recall at any time receiving an advice or a copy of an advice from White Shield or its attorneys to the effect that the Securities and Exchange Commission had agreed with White Shield or its attorneys that the names of brokers through whom shares were sold pursuant to registration statement could be supplied by means of sticker amendment?

A I don't understand that question.

MR. LANDAU: Would you repeat that question, please?

(Question read.)

A I don't recall.

Q To the best of your recollection, in connection with the sales of White Shield stock in August and September of 1971, were copies of a prospectus delivered to the purchasing brokers?

A Yes.

Q In every case?

A Yes.

Q Were these copies of prospectuses with sticker amendments?

A Yes.

Q Did Tobey & Kirk at any time receive from Faulkner, Dawkins & Sullivan an official NASD reclamation or rejection form Number 801 similar to the ones sent by Singer & Mackie and marked Exhibit H for identification?

A No.

Q In the course of your meeting at Faulkner, Dawkins & Sullivan on June 21, 22 or 23, 1971, was any mention made by anyone there on behalf of Faulkner that at or prior to the sale on June 7, Faulkner didn't know that these shares were being sold pursuant to a registration statement?

A No, I don't believe there was any mention that

they didn't know.

Q I think you testified earlier that the reason given by Mr. Green at that meeting for refusing the shares was 10 (b) 6.

A Yes, sir.

Q You said of the Securities Act, I assume you meant of the Securities and Exchange Act.

A Yes, sir.

Q Correction. Securities Exchange Act. Without the "and."

Did you at that time understand what 10 (b) 6 referred to?

A I had just heard of it. I didn't fully understand it.

Q Do you now know what it refers to?

A I think I understand part of it. I don't believe I understand all of it.

Q I am not going to ask your legal opinion as to what it means. But was it at any time your understanding from that reference that Mr. Green was speaking of a failure to disclose that the stock was in registration? Or out of registration, or being sold pursuant to a registration statement?

A No, I don't believe it was--

Q Did anyone else at Faulkner at that time or during that period complain that Faulkner had been misled into buying stock not knowing that it was being sold pursuant to a registration statement?

A Yes, there was a reference made that they were not fully aware of it. And I stated that--

Q Well, when was that reference made?

A During this meeting.

Q During the meeting of June 21, 22 or 23?

A Yes, sir.

Q Who made the reference?

A I believe it was Mr. Green.

Q All right.

Was any inquiry made of Mr. MacMillan in your presence by Mr. Green or anyone else at that meeting regarding the registration statement?

A Yes.

Q Was it made by Mr. Green?

A Yes, I believe so.

Q In your presence?

A Yes.

Q Do you recall what Mr. Green said to Mr. MacMillan?

A I believe Mr. MacMillan was asked, and I believe

he said that he did know it was registration stock, yes. And I will add to that, that somebody in the room made a statement that Mr. MacMillan didn't know what he was talking about.

Q That Mr. MacMillan didn't know what he was talking about.

Who made that statement?

A The representative of Faulkner, whether it was Mr. Green or the other gentleman whose name I--

Q Mr. Cirenza?

A Yes.

Q Did Mr. Vanneck say anything about the registration statement in the course of that meeting?

A I don't believe Mr. Vanneck made any statements.

Q To the best of your knowledge, at or prior to the time of the sale on June 7, had you or anybody on behalf of Tobey & Kirk had any communication with Mr. Cirenza?

A No. Not that I know of.

Q To the best of your knowledge, at or prior to the June 7 sale to Faulkner, had you or anyone on behalf of Tobey & Kirk had any communications with Mr. Green?

A No.

Q Did Mr. MacMillan have any response to Mr.

Green's suggestion that he didn't know what he was talking about?

A No.

Q He just stood there dumb?

A Yes.

Q Did anyone else have any comment on that?

A Not that I recall.

Q Did Mr. Santangelo or Mr. Byrnes address Mr. MacMillan at that time?

A I believe they both made it clear that it had been stated that this stock was coming from a registration.

Q Did Mr. MacMillan say anything in your presence to Mr. Santangelo or Mr. Byrnes, at that meeting?

A Not that I recall. Except I believe at the end of the meeting when we were breaking up, he apologized for anything that had happened.

Q Do you recall the form of words he used?

A I believe he stated when he was-- when we were all leaving, I'm sorry for this whole matter.

Q Did you hear him say anything to the effect of, I'm sorry you're getting screwed?

A Not that I recall.

Q The sales of White Shield stock which Tobey & Kirk made for the plaintiffs in August and September of

1971, how were they made?

A In the over-the-counter market. And by checking NASDAQ and selling them to the best bid on the machine.

Q Do you have any knowledge of why it took from August 9th towards the end of September to accomplish those sales?

A Yes. Because I previously stated the attorneys--

Q No. Forgive me. That's not the question.

Not why you started as late as August 9th, but why it took from August 9th to the end of September to dispose of the shares.

A Pardon me, I understand now.

Yes, because of the market conditions at that time.

Q Was it part of the plan of disposition not to dump the shares on the market?

A At that present time I don't believe the market could have handled forty-four or forty-five thousand shares just being dumped down without driving the stock considerably lower.

Q In your judgment, could 44,000 shares have been disposed of expeditiously in the months of July-- well, in the month of July?

A In the month of July there was an awful lot of stock on the market and I am not so sure it could have

taken an extra 44,000 shares.

Q In fact, Mr. Ross, it is true, is it not, that in early June, 1971, four registration statements went into effect regarding the stock of White Shield; is that correct?

A Yes, sir.

Q And one of those registration statements covered some 800,000 shares in round numbers?

A Yes, sir.

Q And two of them each covered some 400,000 shares in round numbers?

A Yes, sir.

Q And there was a fourth one?

A Yes, sir.

Q Which covered some 300 odd thousand, is that correct?

A I believe that is correct, yes.

Q Which comes to a grand total of approximately a million eight hundred thousand shares of stock?

A Somewheres in that vicinity, yes.

Q Have you any recollection how many shares of stock were in circulation prior to the effective date of the first of these four registration statements?

MR. BAYDA: Objection to the form.

MR. DUFF: I'm sorry. I will be happy to correct it.

What is the objection?

MR. BAYDA: I don't understand what the question means, in circulation. You mean outstanding?

MR. DUFF: Outstanding.

MR. LANDAU: You mean outstanding or do you mean traded in the market? You mean float.

MR. DUFF: All right. Let's ask it in two parts. I will accept the correction, I withdraw the question.

Q Is it true that to the best of your knowledge the first of these four registration statements became effective on or about June 4, 1971?

A Somewheres in that vicinity, yes.

Q All right. Prior to the effective date of that first registration statement, have you any knowledge of how many shares were issued and outstanding of the stock of White Shield?

A Yes, I did know that. But I, at the present time, it's slipped my mind.

Q Have you any present recollection of how many shares were in the float?

A Yes, I did know that, too. But I could check it very easily by looking it up in the book, but I don't have it in my mind right now.

Q Have you an approximation in your mind?

A It would only be a guess, and I wouldn't care to guess.

Q When did you complete the distribution of the 145,000 shares of the sale of the 145,000 shares of stock by Messrs. Byrnes and Santangelo, exclusive of the cancellation of these 45,500 shares by the two defendants?

A Somewheres around, I guess the 10th or 12th of June.

Q Mid-June?

A Mid-June, yes.

Q During the period when you were engaged in selling that stock, did any other broker-dealer other than Faulkner or Singer & Mackie raise any question or objection to purchasing stock?

A Yes.

Q Who was that other broker or dealer?

A I don't recall. There may have been one or two others. I believe the statements were that Faulkner and Singer had spread it all around, and it may have been two or three other brokers that said I just don't

want to get involved.

Q Can you give me the names of any one of them?

A Not at this time. I don't recall.

Q Have you any records which would refresh your recollection as to the names of brokers from whom you had heard that?

A Yes. I might on my copies of the pink sheets which we have a photostat someplace.

Q Would you endeavor as part of these documents that you have agreed to produce to ascertain which brokers may have made that statement or similar statements to you?

A Yes, sir.

Q Did any broker-dealer-- were these three broker-dealers, two or three broker dealers to which you have referred themselves in the pink sheets, to the best of your recollection?

A Yes, they all were.

Q Has your firm in the past participated in sales of stock similar to this transaction?

A Yes.

Q Acting for a selling shareholder under a registration statement?

A Yes, I believe so.

Q Was there anything in this transaction which

differed from the transactions in which you had previously participated?

A Yes. This one was unique in the fact that such large quantities of stock all became registered within such a short period of time with one registration statement and another, after another's becoming effective.

Q I think you testified that you had read the red herring prior to entering into these sales arrangements with other brokers.

A Yes, sir.

Q Was it your understanding that Messrs. Byrnes or Santangelo or Draddy or Pederson were officers or directors of White Shield?

A No, they were not.

Q Was it your understanding that any one of them owned more than ten percent of the outstanding stock of White Shield either of record or beneficially?

A No.

MR. DUFF: I have no further questions.

MR. BAYDA: Cross examination?

EXAMINATION BY MR. LANDAU:

Q I would like to clarify one point.

In your previous testimony on questioning by Mr. Bayda, you said that you had had no conversations with

A I don't really remember, except that he said, you know, he didn't want to have the communications between -- going between Santangelo and myself. He would rather that I talked directly to him.

Q In other words, he asked you to get in touch with Santangelo, is that approximately correct?

A No. He asked Santangelo to get in touch with me.

Q He asked Santangelo to get in touch with you?

A That's correct.

Q Then I take it following that, Santangelo did get in touch with you, is that correct?

A Yes, he did. That's correct.

Q On the recollection of your first conversation with Mr. Santangelo, tell me what you now recall was said by him and by you.

A Okay. He said that he had 150,000 shares of White Shield for sale of which he had 100 and some odd spoken for and he wanted to know if we would be interested in buying a piece of stock, the remaining piece, which was, as we all know, 44,000 shares of stock. And I asked the question, is it good, clean stock? And he said, well, he was waiting for a final okay or a letter of some sort from the SEC giving him okay -- giving him an okay to sell the stock.

Well, from the time of our initial conversation to

the day of the trade, which was three days after, the stock had run about 2 points, I think it ran from 12 to 14½, something like that. Every day I increased my bid for the stock because I wanted to be in line with the market. Needless to say, I could not bid a man twelve when the stock is selling at fourteen and a half.

He called one day and he said, okay, the stock is free to sell. I think it was like fourteen and a half, three quarters. I don't know the market on the stock. I'm just taking a guess. I said, I'll pay you fourteen for it. He said, okay. He said, I'll have to have Vin Ross from Tobey and Kirk call you and finalize this trade, because I clear through Tobey and Kirk.

So, Vin Ross called and said, sold you 44,000 at $14.00, whatever the case may be, and the trade was done.

Now, couple of days after this, I don't know, I think couple of days before settlement date even, Ron had heard that some of the stock --

Q Ron Lattuga.

A And Ron said that he heard that there was some unregistered stock around and that -- this is when I got out of the conversation, by the way. And he called Vin Ross and told Vin that we were not going to accept the delivery of the stock.

Q You called him before the closing date of the trade?

A Before the settlement date of the trade. And told Vin that when the stock came in, and if it wasn't in good street name, or whatever, we were not going to accept the delivery.

Well, the stock came in in 1,000 share series, with a prospectus, if I'm not mistaken, a red herring, or whatever, and -- I got to go back a little. I'm sorry. Can I go back and give you a little more of the conversation?

Q Please.

A Now, when we spoke to Frank originally about the trade --

Q This is Frank?

A Santangelo. Mr. Santangelo.

When we spoke to him about the trade, he said, if you'll look in the prospectus, you'll see that I was one of the selling stockholders in the secondary that was offered by Leason & Co., so forth.

He says, this is away from that secondary. He said, this is stock in another group that I belong to, another corporation that I belong to. And, he said -- I said, in other words, it's good, clean stock? He said, it's good, clean stock. I'm just waiting for an SEC clearance on it.

Okay, fine. The only time I ever saw a prospectus with regard to this stock where I saw Santangelo's name, was when the stock was delivered in by Tobey & Kirk. In other words, our cashier, Frank Powers --

THE WITNESS: What was he, our controller?

MR. GREEN: Head of Operations.

A The head of operations at Faulkner, Dawkins came in and he said, here's this guy's name, all this kind of nonsense. And I looked at it. I said, yeah, fine.

THE WITNESS: Tom --

MR. DUFF: You can show that the witness then addressed Mr. Byrnes.

THE WITNESS: (continuing) -- I don't remember meeting you, Tom, but they told me you were present when we had the meeting, afterwards. I don't even remember seeing your name or anything, to be quite honest with you, because I didn't look that far. The only name that I was certain about was the name of Frank Santangelo.

Q What specifically were you certain about, sir? You say the only name you were certain about.

A Well, because the only person I had contact with was Mr. Santangelo.

Q Alright. Now, let's go back a little. What is

your present recollection of the number of conversations you had with Mr. Santangelo, from the first time you spoke with him after Mr. Santangelo spoke to you, to the time of the trade.

A I guess I must have had about a half a dozen conversations with him, mostly --

Q Well, let's just take it one step at a time. You must have had a half dozen conversations and I think you testified the first time you spoke to him was three or four days before the trade.

A That's correct.

Q Now, the trade was on a Monday?

A Yes.

Q Would you, in saying three or four days, be including the days of the weekend or are you speaking of three or four business days?

A I am saying, business days.

Q Alright, so, then, if the trade was on June 7th, a Monday, June 7th, 1971, you are talking about a period that embraces June 1, 2, 3, and or 4.

A Okay.

Q 1971. Does that fit in with your present recollection?

A Okay. Go ahead.

Q Now, I think you have already testified that on the occasion of your first conversation with Mr. Santangelo, he told you that he had had left over from his initial allotment of some 150,000 shares a figure which we have agreed is approximately 44,000 shares.

A Yes.

Q Would you try and reconstruct for me, to the best of your present ability, everything that was said between you on that day regarding that --

A 44,000 shares?

Q (continuing) -- 44,000 shares of White Shield.

A Well, needless to say I introduced myself to him when he called. And he said he had 44,000 shares --

Q Wouldn't that have been, excuse me, wouldn't that have been kind of pointless since you testified he called you?

A Yes.

Q So, he knew who you were.

A But I didn't answer the phone, okay? Someone else did. I said, I'm Jim McMillen and Jay Vanneck, okay? So --

Q He said?

A He said that he had about 150,000 shares of this stock for sale, of which he had already placed, internally, by the way, which I forgot to mention, over a 100,000 shares

of stock. And he had an overhang of 44,000 shares of stock would I be interested in buying it. I said, I'll be right back. So I had to speak to someone in charge at the time and ask him if it would be okay to make a bid on the stock because it was, it is, or, I should say, it was, a fairly liquid stock, it used to trade in pretty good stock, you could move stock without any problem as a rule.

Q How large a block had you sold previous at Faulkner, Dawkins?

A 60,000, 80,000. Not at Faulkner, excuse me. This one, I was at G.A.Saxton. At Faulkner, Dawkins, I did not trade the stock. Ron Lattuga did.

Q Well, how did it come to be that Mr. Vannek asked you to take the call from --

A Because I was in charge of the desk when Jack Cirenza, who was the boss, was away.

Q That's C-I-R-E-N-Z-A?

A That's correct.

Q Well, you indicated you had to talk with someone before you could make a bid. Was Mr. Santangelo offering you the stock on that day? Did he indicate that if he received a satisfactory price he would sell it to you on that day?

A I believe that if he had clearance from the SEC,

and I made a satisfactory bid, yes, I would have owned the stock.

Q Well, what did you -- what did he say about --

A You're going over conversation, now, you see, you're going past -- you're asking me to relate it to you and yet you're going ahead of me.

Q Well, you said you had to go back to someone and check on whether --

A Alright. But I had to go through a formality, okay?

Q Okay.

A Now, I called Santangelo back. I said, is this good, clean stock? Words to that effect. He says, I'm waiting for SEC clearance on it. As soon as I get clearance, yes, the stock will be free to be sold.

Q Okay. Now, let me stop you there.

A Please do.

Q What do you mean, what did you mean, if it's different or what do you now mean by good, clean stock?

A Well, stock that didn't carry a legend. Stock that was not part of the secondary or -- that he held back from the secondary. Things like this. See, there's, for the sake of trading, or in the trading venacular, every time you see a big piece of stock, the question that one trader

always asks when a large piece of stock comes in, is it clean? And we assume that the broker has gone through the motions and checked it with his legal department or compliance department or whatever to make sure that this stock was free to be sold in the street without any problem.

Q Alright. In your experience, and you have had quite an extensive experience in the market, isn't the word, isn't the phrase, good, clean stock, refer to stock that is not subject to a legend, for instance?

A That's correct.

Q That has complied with the requirements of the 1933 Securities Act?

A Yes.

Q Or stock that is being sold pursuant to a recognized exemption under the 1933 act, is that your understanding?

A Yes.

Q In other words, private placement stock, for example?

A No. Private placement stock?

Q Yes. Stock that bears no legend, a stock that is taken --

MR. DUFF: Excuse me.

(Short recess taken at this point.)

A Private placement stock, as a trader, you don't want to get involved in a stock that is private placement stock. Because what it does is take away, it takes you out of the sheets on the stock, or, as it is now, the NASDAQ machine, and makes you a distributor.

In other words, if I buy 44,000 shares of stock that's private placement stock, I have to place that and not be a market maker in this particular stock. And I don't want to do that.

Q Alright, let me ask you this, a man buys stock from a company in a private placement.

A Yes.

Q He buys it pursuant to a letter of investment.

A Yes.

Q The stock is then ledgened, is it not?

A Yes.

Q That it was taken without registration under the 1933 act, that it may not be sold.

A Yes.

Q Alright. Two or three years down the line, he wants to sell the stock.

A Yes.

Q He procures an opinion letter of counsel and the company removes the legend.

A Yes.

Q Does that meet with your definition of good, clean stock?

A No.

Q It does not?

A No. Leo, your talking today's rule, okay? I believe you're talking today's rule. Three or four years ago, I think it was a little different.

Q Alright, tell me what you understood the rule to be.

A What I understood, okay. Everything that happened in private placement stock, I believe, first, the legend had to be taken off by the company, and then the stock had to go into the SEC, then it becomes stock that is now saleable.

Q When you said that stock had to go into the SEC, what do you mean?

A It had to be cleared by the SEC.

Q Cleared in what way?

A To be sold in the street as good, clean stock.

Q What does the SEC do to clear it, or what did it in 1971?

A I would assume they would check the legend, make sure that it wasn't -- what could I say? I guess they would

have to check to see if the stock wasn't fraudulent stock. I guess somebody would have to check on it, if I'm not mistaken, to see that the stock was registered with the company, the company and their attorneys have taken the legend off, and, therefore, they would allow the stock to be sold.

Q Okay. What did you understand to mean when he said he was awaiting clearance from the SEC?

A I figured that he owned some insider stock that required a notification by the SEC that they recognize him as one of the holders, the inside holders of the stock. And that they would have to go through the motions checking with the attorneys for the company to make sure that this stock was -- that the legend was taken off the stock by the company's attorneys so he can -- so he would be allowed to sell it.

MR. DUFF: I'd like that read back.

(Answer read back)

Q Well, in this first conversation you had with Santangelo, he indicated he was waiting for SEC clearance, is that correct?

A Well, now, the first conversation? I don't recall, I'll be quite honest with you. I don't recall.

Q Well, then, you indicated earlier that that same day you called him back after speaking to someone.

A Yes, that's correct.

Q Whom did you speak to?

A Who did I speak to? I had to speak to Jack Cirenza and ask Jack if it would be okay for us to --

Q What was Mr. Cirenza's title at that time?

A Jack was just head of the trading department, no executive title.

Q What did ycu tell Mr. Cirenza?

A I told him that Jay Vanneck had this phone call, or words to this effect, I don't recall, needless to say, this is conversation, you don't remember, that we're being offered 44,000 shares of White Shield.

I said, it's a stock that's fairly liquid. If we buy it, there is a possibility we'll be able to make a trade. He said, well, if you think you can make a trade out of it, then go through the motions and do whatever you have to do. To me, going through the motions was to ask him if the stock was good, clean stock.

Q So then you called him back?

A Yes, I did. I had to call him back.

Q And by him, I mean Santangelo.

A Santangelo, that's correct.

Q Alright, now, do you have any recollection of what passed in this particular conversation? This is your second

conversation with him on that first day.

A I told him -- well, as I told you, I asked him if it was good, clean stock.

Q That's what you asked him the first time, or am I wrong there.

A No, the first time -- no, you're right, the first time. And I must have asked the question again, just to be certain --

Q Yes.

A (continuing) -- for our own records. And he said any day now he expected a letter from the SEC allowing the stock to be sold and --

Q Did he use the word, letter?

A I'm sorry, he said, expected notification, I'm sorry, from the SEC that this stock was okay to be sold.

Q Okay.

A And then I think that was the extent of the conversation. Then the stock got a little better, if I'm not mistaken.

Q Well, let's just stop there.

A Okay.

Q That was the extent of the conversation, no trade was discussed?

A No trade, no.

Q Was any price discussed at that point?

A I don't recall. I don't recall.

Q Now, after having this conversation with Mr. Santangelo and before any prior -- subsequent conversation with Mr. Santangelo, did you talk with anyone else about this potential trade?

A I didn't, but Ronnie did, with regard to, you know, what we are going to do if we did buy it, you're making reference to.

Q Well, if Ronnie did, then presumably you had a conversation with Ronnie.

A Oh, I had to tell him. He was trading the stock. It wouldn't make sense for me to buy his stock and not tell him.

Q I'm just reminding you you had a conversation with Ronnie. What did you tell Mr. Lattuga?

A Told Ronnie there was 44,000 shares of stock for sale. And I told him I had a conversation with Jack. I told Jack that it was a stock that moves in pretty good sizes, that we should have no problem getting rid of it if the market conditions were right. So, Ronnie says, well, let me call up, who was it, Mitchum --

Q Jones?

A Yes, Mitchum, Jones, I think Kenny will take some.

And let me call up Singer, Mackie, I think Jimmy, meaning Jim Mullens of Singer, Mackie, I think Jimmy will take some. Well, I think that they agreed on a cleanup, which is buying the whole thing, and assuming the trade was free and clear, that one guy would take 10,000, meaning Mitchum, Jones and Singer, Mackie would take 5,000. So, that's 15,000, which would leave us with 29,000 shares of stock. We had a short position at the time, if I'm not mistaken.

Q This is a short position quite apart from this potential trade?

A Right.

Then the stock started to run.

Q By run, you mean --

A Going higher. So, I had conversation with Frank. And I called him up --

Q Before you get on with this next conversation with Frank. If I understand you correctly, after your two conversations with Santangelo on this first day that you spoke with him, you spoke both with Cirenza and with Lattuga?

A That's correct.

Q And Lattuga, in effect invited Mitchum, Jones and Singer & Mackie to take a portion of the stock which you would buy, if you bought it, is that correct?

A Yes, that's correct, right.

Q Now, when was the next conversation you had with Frank Santangelo?

A As I said, the stock started to run up. And the next day, I called him and asked him if he had any word yet from the SEC with regard to the stock. He said, no, he's expecting it any day now, or any minute, or whatever the case may be.

Q Was there any discussion of price in this particular conversation?

A Somewhere along the line, I did have conversation or discussion with him about price, but I couldn't tell you the time or the day, okay? And then I called him again in the afternoon and I asked him --

Q Same day?

A Same day, right.

Q In other words, the second day.

A No, no. This is the second time in the second -- same day, right. So, I asked him -- he expected to hear word, so I figured I'd try him in the afternoon, because there seemed to be some anxious buyers out there. I figured -- the only time to sell them is when there's buyers.

So, I called him. And he said he still hasn't had word. And the next day --

Q That was the third day?

A The third day, right, which was probably Friday, I guess.

Q Well, if the third day was Friday, then the first day would be Tuesday.

A Yes. No. Wednesday would be the first day.

Q I beg your pardon, Wednesday, Thursday, Friday.

A Right. I think I had -- Ronnie had asked me to call him to ask him if he had any word yet. I spoke to him. And he said, no, nothing yet, or, whatever. I went out of the room for a while to get lunch or something, and the stock was still going, I guess, and Ronnie called him.

Q Where was the stock at this point, if you recall.

A I think it was around 13½, 13¼, somewhere around there. And Ronnie called him and asked him if he had any word. He said, no. So, I said, okay, Ronnie, let's wait one more time. This afternoon maybe I'll give him a call to find out if and when.

Q To the best of your knowledge -- and we're now talking about Friday.

A Yes.

Q (continuing) -- that was the first time that Mr. Lattuga called Frank?

A You know, here again, Leo, the day, I couldn't tell you. But I know there was a time when I walked out of

the room, and I have to assume it was like on the third day he called him and asked him if he had any word yet, or -- here, again, these are the questions you're going to have to ask Ronnie, what transpired in conversation between he and Santangelo, okay?

Q Okay.

A Then, I said, well, I'll call him later on in the afternoon --

Q Still Friday?

A Right.

(continuing) -- to find out. And Frank had told me, I guess, that he didn't hear anything, and, you know, I guess it's just a forgotten item for the weekend. I said, we'll just have to go into Monday. Then Monday --

Q Before we get past the weekend.

A Okay.

Q Have you any recollection of how many shares of White Shield Faulkner, Dawkins traded that Friday?

A No, I don't.

Q Well, forgetting specific numbers, was there a large volume?

A I couldn't answer that. Here, again, you got to remember, Leo, I don't trade the stock and I'm not concerned with the volume figures. That would be Ronnie's

problem. My only concern was the trade that was to take place with Santangelo, and anything around that would be problems that would concern Ron and this stock and not me.

Q This particular potential trade had to be addressed to you by Mr. Santangelo?

A Yes.

Q Would you derive any additional compensation from consummating that trade?

A Absolutely not.

Q Did you become aware that on June 4th, which was the Friday we're speaking about, 1971, three registration statements had become effective with respect to stock of White Shield Corporation? Were you aware at that time?

A I wasn't aware -- I'm not even aware -- this is the first I heard of it, Leo. I wasn't aware at all. I wasn't aware at all.

Q Well, did you at the time prior to June 7, 1971, and I mean you, personally, not Faulkner, Dawkins, make any investigation or any calls to White Shield Corporation or its attorneys?

A Prior to this trade?

Q Prior to this trade.

A Or their attorneys? That would be -- no, I --

Q You did not?

A No, I did not, Leo, I don't recall. I think that would be Marc Green's department, anyway.

Q Okay. Now, then, that takes us up to the weekend. What happened Monday?

A Monday --

Q June 7th.

A Well, we finally got the call. Here again, the time of day, I don't know. We finally got the call, and he says, okay, he says, I finally got SEC clearance. The stock is okay to be sold. We said, okay, I'll pay you fourteen. I'll bid you fourteen for the 44,000. And he said, sold to you. But I have to have Vin Ross call you from Tobey & Kirk and give you, you know, the trade, because Tobey & Kirk does my clearing.

So, Vin Ross called. He says, I'm Vin Ross, Tobey & Kirk. I sold you 44,000 shares of White Shield at 14. Thank you.

Q How did you settle on the $14.00 price?

A Well, I think we took it about half a point or 3/8ths of a point off the market that day. Because it was a good size piece --

Q So, the market was 14½, 14-3/8ths.

A Let's say, 14½, 3/4s was the market, or 14½, 15 was the market. And we just said, I'll pay you 14 for it,

which he thought was a fair price, and which we felt was a fair price. And we bought the stock.

Q When you say, the market was 14½, 14-3/4, are you speaking of the bid price or ask price?

A 14½ price, I'm giving you both the bid and ask price. I'm assuming this was bid and ask price of the stock at the time.

Q Well, what led you to believe that 14 in those circumstances would be a fair price?

A Because it's a good size piece of stock, Leo, and, usually, you take a discount from the present market price.

Usually, you take a discount from the market price on a good size block of stock when you feel you have no problem moving it. And 14 was a good price. Especially since, I'd have to say, especially since the day he came in, he initially started trading with us, the stock was selling at $12.00. So, I imagine he felt he did substantially better than the initial day of conversation with us and why look a gift horse in the mouth, so to speak.

Q Now, was there any discussion regarding whether the stock was clean or not on this Monday?

A I believe we did ask that question one more time: you got the SEC clearance? Is it good, clean stock? And he says, yes. We said, okay, fine. And we wrote the ticket.

Here, again, that was when Vin Ross called us and said, 44,000 I sold you at 14.

Q Alright, now, I think earlier this morning you testified that a day or two after this trade, you heard that the stock might not be good.

A Two days prior to settlement date I said to you, Leo.

Q Okay. What did you hear and from whom did you hear it?

A I didn't hear it. This is what Ron had heard.

Q Alright. What did Ron tell you?

A Well, here, again, he told me that he heard that there was some unregistered stock floating around after the secondary, and that Tobey & Kirk were just selling stock in another market, after we had bought this piece of stock from him.

Q Now, is this the first occasion you heard about a secondary?

A I don't understand what you're saying. What secondary?

Q You just testified that Ron said he heard --

A The secondary was the stock offer by Leason & Co., which we knew about, of 700 some odd thousand shares of stock, if I'm not mistaken. That was the secondary we know of. Okay

I mean, I knew about the secondary; that was obvious.

Q Alright, now, what do you mean when you say secondary, for the record.

A Secondary? Is stock offered by selling stockholders of the company right now.

Q Offered how?

A Through a broker dealer.

Q With or without a registration statement?

A With a registration statement.

Q Okay. So you knew that there was a registration statement in effect as to stock of White Shield, a registration statement, is that correct?

A That's correct.

Q When was the first time you knew that?

A Oh, way before this trade took place, I could tell you quite frankly.

Q How long before?

A As a matter of fact -- wait a second. When was the day that secondary was effective?

Q I don't know which secondary we're talking about.

A The secondary by Leason & Co.

Q My information is it became effective on June 14th.

A Okay. We knew about the secondary about a month before it became effective. Everybody -- when there's a

secondary, you have to file. Everybody knew that Leason was working on a secondary.

Q When you say, file, what do you mean by file?

A With the SEC.

Q Okay, so you knew there was a secondary.

A That's correct.

Q In a stock in which Faulkner, Dawkins was making a market, is that correct?

A That's correct.

Q Did Faulkner, Dawkins, to your knowledge, obtain a copy of the red herring respecting that registration?

A I would a -- well, here again, I don't know, but I would assume they did.

MR. BAYDA: He asked to your knowledge.

A To my knowledge, no, I did not know.

Q Did you not tell me in a telephone conversation we had about a month ago, that Faulkner did have a registration statement prior to the trade?

A No, I did not tell you that, Leo.

Q Well, then, my recollection --

A What I told you was that when the stock was delivered, the 44,000 shares was delivered, it was delivered with a prospectus, or a red herring, and in it we saw Santangelo's name. And that's the only time I ever saw

anything in writing with regard to White Shield.

Q Did you see that prospectus or red herring?

A I only saw what was shown to me by Frank Powers, was, as I told you, he opened the page and showed me Frank Santangelo's name. And a bunch of other people's names, if I'm not mistaken, as selling stockholders.

Q Okay. What do you understand by the term, red herring?

A It's just a preliminary prospectus with a finalized prospectus to follow.

Q Alright. Well, is it clear in your own mind that what you saw on the day of the delivery of the stock could not have been a red herring?

A Leo, here again, I did not see the cover of -- to my knowledge, now, here again, I did not see the cover of this red herring or prospectus. All I saw was the page opened to the names that showed -- the page, rather, that showed Frank's name, rather, so forth, as stockholders.

Q Do you understand that a red herring is a preliminary prospectus in advance of registration, and that a final prospectus is something that is issued after the registration statement?

A That's correct.

Q Is it also your understanding that the prospectus

Michael Bayda.

Q Alright, when was it read to you?

A Two weeks ago, I guess.

THE WITNESS: Was it, Mike, when I was up in your office?

MR. BAYDA: Approximately.

A Approximately, two weeks ago.

Q And did that report refresh your recollection as to what transpired in June of 1971?

A Leo, it was everything I already knew. I mean, there was nothing in it to recall except what I'm telling you right here now. It's just a, you know, a month after something takes place, when you don't think that much of it, you know, it's just another trade in your life, you don't place it in any -- you don't give it any place of importance in your life, so.

Q You regard this as just another commonplace trade, is that it?

A Leo, at the time I did.

Q When did you stop regarding it as a commonplace trade?

A When all this litigation came up. And I didn't get involved in the conversation of it until about 6 or 9 months ago, then I never heard word from anybody again.

Q Didn't you attend a meeting at Faulkner, Dawkins on or about June 23, 1971?

A Yes, I did.

Q Do you recall who was present at that meeting?

A Well, there was Vin Ross, Frank Santangelo, Tom Byrnes, who I didn't know, was a blank face to me at the time, Marc Green and I forget who else. Ron Lattuga, I'm sure was there, right. And myself.

Q Anyone else from Faulkner?

A I don't recall. I don't recall.

Q Do you recall what was said at that meeting?

A No. I just discussed at the meeting probably everything I just said to you here with regard to the trade itself. Beyond that, it became a problem for Marc -- it was Marc Green's problem and I think they entered into discussion with Santangelo and Tom Byrnes about it at a later date.

Q Well, but at that meeting, were you not aware that Faulkner had cancelled the trade?

A Oh, yes, I was aware of that.

Q Were you not aware that -- well, strike that.

What do you recall was said at that meeting and by whom.

A I don't recall any of that meeting, I'll be quite honest with you, Leo.

Q Did you have any conversation, private or otherwise, with Santangelo?

A I never entered private conversations with that man at all.

Q You never said hello or goodby to him?

A If that's important to you, then, I did say. I met the man and shook his hand, as I'm sure I did probably with Tom, and I didn't remember him. And I shook hands with Vin Ross. If he were Vin Ross, I probably wouldn't even know him (indicating.)

Q You didn't say to Frank Santangelo that you were sorry about all this?

A I might have. If that's what Frank recalls, I might have said it. I'm not aware of it, if I did.

Q Well, you were at that time, were you not, that Faulkner was contending, and still contends, that your version of what was said between you and Santangelo, and Santangelo's version, were quite different?

A So, what are you trying to tell me?

Q I mean, your aware there was a dispute of what was said?

A Obviously, there was a dispute, or I wouldn't be here.

Q Well, I assume that, too.

Q Let me ask you this, you have testified that a couple of days before the closing date Faulkner learned that there were some shares being sold -- how did you describe it?

A Unregistered stock.

Q (continuing) -- unregistered stock outside the secondary.

A The Leason secondary, yes.

Q Now, what did you understand that to mean?

A That there is unregistered stock, that's the only way I can describe it. In other words, stock that was not registered with the SEC or any other legal body that had anything to do with making stock good clean stock to be sold in the Street.

Q Was it your understanding that Faulkner was going to cancel this trade because it had reason to believe this stock was unregistered?

A I can't answer that. I don't know. Listen, I told you, after the trade, I stepped out of the picture. This is conversation that -- this is something Ron had heard and he just conveyed it to me. And, thereafter, the conversation took place between he and Marc Green, and I was completely out of that picture.

Q What did Ron tell you, precisely?

A That there was unregistered stock around and he

had believed that this might be part of it.

Q I see. He believed that this might be unregistered stock?

A That's correct.

Q Was it your understanding that Faulkner could not take it if it was unregistered stock?

MR. BAYDA: I object. I object to that question.

Q Alright, you may answer it.

A Nobody would take unregistered stock on Wall Street.

Q Was it your understanding in June of 1971 that that was the reason why this trade was being cancelled?

MR. BAYDA: I object to that question.

A I don't know, Leo.

Q Did you have any other trades in White Shield during the month of June, 1971, you, personally? I don't mean for your own account. I mean you as a trader for Faulkner.

A Leo, we traded the stock, you know, we bought and sold stock from other brokers in the Street, of course we had other trades.

Q How long was Faulkner selling this stock in June and buying it?

A How long? I assume for the entire month.

Q No sir.

MR. BAYDA: I prepared it.

MR. DUFF: Alright.

THE WITNESS: I'm sorry. I thought it was a copy of the letter you sent me with the subpoena.

Q No.

A I'm sorry. Okay.

Q So, this affidavit was prepared by Mr. Bayda?

A That's right.

Q And it was reviewed by you?

A Yes.

Q In reviewing it, what specifically did you check for, if anything?

A Well, specifically, I was checking for the questions I had directed to Mr. Santangelo with regard to the trade itself. And how the stock, rather, not how the stock, but if he was selling stock in addition to the secondary which he was the selling stockholder in, or if this was good, clean stock away from that secondary, as he had stated.

Q Now, you stated in paragraph 6 of this affidavit that because Faulkner was a market maker in the common stock of White Shield Corporation, and accordingly could not participate in a distribution thereof, I specifically asked Mr. Santangelo in one of our telephone conversations prior to

June 7, 1971, whether his shares were part of the registered distribution. He answered that his shares were not part of the registered distribution.

Now, is that a correct statement?

A Yes.

Q Alright, let's take it part by part. What do you mean when you say that because Faulkner was a market maker it could not participate in a distribution? What did you understand this to mean?

A What I understand any distribution to mean is you have to take yourself out of the sheets or out of the machine, as it is today, as a market maker in that particular stock and distribute it without soliciting.

Q Alright, what do you understand the word distribution to mean?

A Just what I told you.

Q No, you told me what a market maker had to do if he was participating in distribution. You didn't tell me what you undetstood the word distribution to mean.

A Distribution is the selling of stock by a known market maker through retail sources.

Q Through or to?

A Through.

MR. BAYDA: Would you read back the question and

answer, please?

(Reporter read back question and answer.)

Q You do mean through?

A Through.

Q Selling of what?

A Shares.

Q Any shares?

A Specific shares, right? Not every stock is a distribution.

Q Well, what in your mind -- you made this affidavit, whoever prepared it, you made it and you put your signature to it, and you have said in it that because Faulkner was a market maker it could not participate in the distribution of the stock of White Shield.

Now, I would like to know what you understand the word distribution to mean. Or at least what you understood it to mean on May 3rd, 1973.

A Well, distribution is the selling of stock, in this case, a stock such as White Shield, through retail channels other than -- to other than market makers. In other words, if you're a retail firm you can sell it internally and tag on a credit for your retail salesman, to enable them to make money.

But as distribution stock, you cannot solicit

stock if you're to sell it in the Street. If you had distribution stock, you cannot call a trader up and say I have got 5,000 shares of distribution stock for sale. That would take that market maker right out of the sheets on the stock.

Q But what is distribution stock?

MR. BAYDA: I object. I object to any further questions along this line.

MR. DUFF: Well, you're entitled to object all you want. This is an affidavit which you secured this gentleman's signature to, in which you got him to say what was convenient for your case.

MR. BAYDA: I object to that characterization also.

MR. DUFF: The judge can rule on whether it's appropriate or not.

MR. BAYDA: There's been no testimony that I got the witness to say anything.

MR. DUFF: His signature appears on this and he has testified --

MR. BAYDA: I'd like to repeat, the witness is not an attorney. And we're discussing legal terminology.

MR. DUFF: And so you think it is appropriate for an attorney to set up a legal trap and have a non-attorney sign it, not knowing what he is signing?

MR. BAYDA: I object.

MR. DUFF: The man has just testified quite clearly that he does not know what a distribution is, and yet you had him testify as to what a market maker can or cannot do with respect --

MR. BAYDA: That's correct. That's correct.

Q Now, I ask again, sir, what you understood on May 3rd a distribution to entail --

MR. BAYDA: Objection.

THE WITNESS: I think I already answered it.

MR. DUFF: Your objection is noted.

A Leo, I already answered it. I'm not going to answer it again.

Q I don't think you have answered it.

MR. DUFF: May I have the last answer back, please?

(Reporter read the last answer back.)

A If he purchased it.

Q Well, as I read your last answer, you have told us who can buy and who can sell distribution stock, but you have not told us what distribution stock is.

MR. BAYDA: Objection.

Q Now, do you know what distribution stock is?

MR. BAYDA: The question has been asked and answered.

MR. DUFF: I don't think it has. And all we're doing is setting ourselves up for a visit to Judge Gurfein.

You may move to strike any answers that the witness gives, if they're irregular. If your objection is as to form, I will be happy to correct my question to comply with the requirements of form. But so far as relevancy goes, you have your objection, it is very plainly on the record.

MR. BAYDA: This is the third time the same question has been asked.

MR. DUFF: It is the third time, and, hopefully, we will get an answer.

THE WITNESS: Leo, repeat your question again, please, if you don't mind. I'm not being picky with you, believe me, okay. Because --

Q What you answered me last time --

A Okay.

Q (continuing) -- is what you can and cannot do with distribution stock.

A Leo, that's the --

Q What I would like to know is what you mean by distribution stock?

MR. BAYDA: Objection.

A Leo, I answered it as a trader would have to answer your question with regard to his position in a particular stock and what he's able to do if he bought and sold that

stock through his own retail from another retail firm.

And I think that's the way I have to answer it, as a trader. What I'm doing is taking away my marketability by getting myself involved in distribution stock as a trader.

Q This only raises the question again, Jim, what do you mean when you say, getting involved in distribution stock? What is distribution stock, in your understanding?

MR. BAYDA: Objection.

A Leo, I feel as though, the way I just answered you the last time, I feel as a trader I have answered your question.

Q Well, I'm interested now not as a trader but as the man who made this affidavit. Let me ask you this, do you know the difference , I'm not asking you what is the difference, I'm asking you if you know the difference between an underwriter, a dealer and a broker.

MR. BAYDA: Objection.

A Yes.

Q Alright, can you tell me what you understand to be the difference between an underwriter and a dealer.

MR. BAYDA: Objection.

Q He may object for the record. If you refuse to answer the question --

A I don't feel I have to answer it, Leo, as a trader.

because Faulkner was a market maker, it could not participate in a distribution?

A Because in conversation with Mr. Santangelo, he never at that time stated to me that his stock was distribution stock, and, therefore, I felt, as a dealer, stay in line with the terminology we're using, please, that I can buy this stock, White Shield Corporation, and trade it as I would any other stock buying it for my own account and selling it for a profit or a loss, whatever the case may be, without removing myself from the sheets as a distributor of this stock.

Q Well, then you have just testified that you were acting as a dealer, is that correct?

A That's correct, sir.

Q There's no question in your mind that that was what function Faulkner was fulfilling in White Shield in June of 1971?

A That's correct, sir.

Q You have testified before, we're not talking now about the registration statement covering Santangelo's shares or the prospectus covering Santangelo's shares, you have testified before that there was, to your knowledge, a registration statement covering some White Shield Shares, 700,000 worth, and that you knew of it about a month before this

trade, is that correct?

A That's correct.

MR. BAYDA: Objection.

MR. DUFF: On what basis?

MR. BAYDA: I don't believe the witness ever testified that he knew whether or not this registration statement covered Santangelo's shares.

MR. DUFF: I specifically said we're not talking about the registration statement covering Santangelo's shares.

MR. BAYDA: Yes, but this witness never testified that the registration statement that he knew of about a month before the trade covered Santangelo's shares.

Q You knew there was a registration statement covering shares of White Shield Corporation, is that correct?

A Yes.

Q And you knew this about a month before the trade with Santangelo?

A That's correct.

Q Did you know that that registration statement covered shares owned by Frank Santangelo?

A No sir, I did not, until it was told to me in conversation with him, I was not aware of it.

Q When was that, sir, the conversation?

A The conversation was when we were getting into a discussion of putting this trade together, the 44,000. He said, I told you this before, he had mentioned in conversation to me, I'm one of the stockholders of the secondary now being offered -- that has been offered by Leason & Co.

These are shares offered by me in another corporation and it's away from the secondary by Leason & Co.

Q And that conversation you have just related occurred prior to June 7th, the date of the trade?

A Yes, it did.

Q And you have testified that you knew you could not take registration stock, is that correct?

A What do you mean by registration stock?

Q Distribution stock.

A Yes. And it was never stated to me that it was distribution stock.

Q Well, I didn't say it was. I said, you knew at that time --

A I just wanted to clarify it.

Q (continuing) -- that Faulkner could not take distribution stock?

A That's correct, sir.

Q Now, then, did you or anyone at Faulkner make any effort to obtain a copy of the red herring covering the

registration stock or the distribution stock which Mr. Santangelo disclosed to you he had?

A I don't know. I don't remember. I'll be quite honest with you, Leo, I don't remember.

MR. GREEN: Did you?

Q I say, did you?

A Did I? The answer is, no. Are you talking about me, specifically?

Q I'm talking about you, specifically.

A No, I did not. I'm sorry. I thought if you were asking whether someone within the organization had gone through the motion.

Q Alright. Did you disclose the substance of this conversation you have just related, to Mr. Lattuga or Mr. Green or anybody else, prior to the trade?

A Oh, yes, Ron Lattuga. I have to tell Ron. He trades the stock. I have to tell him. And -- yes, I did tell him. I have to tell him.

Q Alright. So, prior to the trade, Mr. Lattuga knew that at least some shares owned by Santangelo were distribution shares, is that correct?

A No sir. I told you this before and I'm repeating it again, we were at no time told that shares we bought were distribution shares.

Q I didn't ask you that question.

MR. BAYDA: Would you read back the question, please?

THE WITNESS: I'm sorry. I may have misunderstood you.

(Reporter read back the question.)

A No. I'll have to say, no.

Q Well, then let us go back. Santangelo told you, did he not, prior to the sale, that he was selling some shares pursuant to a registration statement, is that correct?

A Yes.

Q And he also told you, you have testified, that the shares he was offering to Faulkner, Dawkins were not part of that distribution, is that correct?

A Yes.

Q Now, you then went and told Mr. Lattuga that Santangelo -- what Santangelo had told him, told you, is that correct?

A Yes.

Q So that prior to the time of the sale, is it not true that Mr. Lattuga knew that Santangelo was selling some shares pursuant to a registration statement but that shares he was offering to Faulkner were not subject to the regis-

tration statement, is that correct?

A Yes.

Q Now, do you know if Mr. Lattuga at the time prior to this trade obtained a copy of the red herring, of any red herring applicable to shares of White Shield?

A I have no idea. I have no idea.

Q Do you know if anyone else at Faulkner, Dawkins obtained a red herring?

A I have no -- I don't know. I really don't know.

Q How many stocks, in your experience, have you, as a trader with a company that was a market maker, have you dealt with?

A A lot, I'll put it to you that way.

Q Fifty, a hundred?

A Probably.

Q Has it ever happened with respect to a stock with which -- in which you were trading for a market maker, that there has been a primary or secondary distribution of the stock at some point?

MR. EAYDA: Can you define for the witness the term, primary?

Q Do you understand what the term primary distribution means?

A I want to know if you understand it.

think it has?

Q Well, My understanding of the words "clearance through" is where one broker clears through another who keeps the books and runs it through his computers.

A Yes. Okay. Then we're both on the same track. Yes.

Q Was it your understanding that Frank Santangelo was a broker dealer?

A If he's a specialist on the floor, I would assume he was, yes.

Q You would assume that?

A Yes.

Q And so it was your understanding that he was selling for his own account but clearing through Tobey & Kirk, is that correct?

A This was not particularly his account. This was a corporation or a group he was part of. He was selling for his group, I would say, or his corporation.

Q Now, he told you he was selling for a group, is that right?

A That's correct. Of which Tom Byrnes was a part of, yes.

Q Did he tell you that at the time?

A No, at the time he did not. This is something I

have gathered through conversations since then.

Q Well, let's just restrict ourselves to what you knew prior to June 7 or on June 7, 1971.

Was your understanding that Santangelo was selling for himself and some others, is that correct?

A That's correct.

Q Did you make any inquiries as to who those others were?

A No sir.

Q Are you quite clear that he called you to tell you the stock was clear? He testified and Vin Ross testified that you had placed the call to Santangelo. And they also both testified that the call you placed to Ross was routed to Santangelo's office, where both Ross and Santangelo and Byrnes and Mrs. Santangelo were then gathered.

A Here, again, you know, just a matter of who called who, I would have to assume that he called me, okay? But, here again, I don't remember every step of the way what happened. I couldn't tell you how many times I called him. And I couldn't tell you how many times he called me. But I know that a trade came out of this whole thing.

Q Well, isn't it a fact that Faulkner, Dawkins --

A I would have to assume since he's selling the stock and he was freed up, if the stock was freed up to be sold,

substantial block of stock in White Shield had come on the market, did you not?

A Leo, I have no idea. I'm telling you, I have no idea.

Q You did not know that three registration statements come effective on --

A I had no idea of any registration statements. I was only concerned with the trade itself.

Q And Mr. Santangelo never in his discussions with you used the term, registration?

A Like I said to you, he might have used the term registration when he was referring to the fact that he had his stock in registration waiting for it to be freed up by the SEC. Here again, I have no idea of conversations, particular conversations.

Q And you never, yourself, examined a registration statement including shares owned by Santangelo?

MR. BAYDA: When are you speaking of?

A What time?

Q Prior to the sale.

A Prior to the sale, no sir.

Q Did you ever examine a registration statement covering Santangelo's shares after the sale, a registration statement or a prospectus?

MR. BAYDA: The witness already testified.

A I already told you what I saw. You can check back the records, and it will tell you when I saw it. (indicating.)

Q Did you at the time prior to the sale, inquire of Santangelo how many of his shares were distribution stock and how many were not?

A There again, I told you, the previous statement, the word distribution never came up, with regard to this trade, to my knowledge.

Q Well, now, let's go back. I think you testified that he said he had some stock in a secondary.

A I'm talking about this particular stock. You're talking about the Leason secondary.

Q Well, I think my question speaks for itself. Did -- is it not true that Santangelo told you he had some stock in distribution but that this stock he was selling to you was not in distribution, is that correct?

A That's correct.

Q Now, did you at the time inquire of him, at the time prior to the sale to you, by you, I mean Faulkner, as to how many shares he was selling on the secondary and how many shares he had apart from the secondary?

A Apart from the secondary, he told us he had 150,000 shares of stock. And I believe I stated that earlier also,

Leo.

Q He told you that he had 150,000 that were apart from the secondary?

A That's correct.

Q Do you have any idea how many shares were outstanding on June 3, 1973 -- '71?

MR. BAYDA: Objection.

A I don't know. There was a lot, I know that. About five million, if I had to venture a guess.

Q What was the float in the stock at the time, if you recall?

MR. BAYDA: Objection.

A A lot.

MR. DUFF: May I ask the grounds for the objection?

MR. BAYDA: Grounds of relevancy.

MR. DUFF: Oh, alright, your objection is noted for the record.

A A lot. That's the only way I can answer it, Leo. If you ask me to put a number on it, I couldn't put a number on it. But it was a lot.

Q So it was your understanding, if I understand your testimony correctly, it was your understanding that Santangelo was selling on a secondary and at the same time had 150,000 shares?

A Additional shares, right.

Q Which were not on the registration?

A That's correct.

Q Didn't that fact arouse any curiosity in you as to how many shares he owned?

A He told us that this was away from the secondary and it was part of another corporation that he belonged to, and they were selling the stock. I think I also stated that earlier. And I asked the questions that I felt were important. And I think I also stated that earlier.

Q Okay. Well, do you know, you do know, do you not, that certain persons, control persons, corporate officers and directors, stockholders of 10% or more of the company, a company, any company, may not sell their shares without a registration statement?

MR. BAYDA: Objection.

Q Do you know that or do you not?

A State your question again, please, Leo.

Q Do you know --

A 10% ownership.

Q (continuing) -- that certain persons, called control persons, are forbidden to sell stock in a company with which they are control persons unless they sell pursuant to a registration statement?

MR. BAYDA: Objection.

A It was part of a corporation. I don't know the extent of -- here, again, the numbers I gave you as to amount of shares outstanding for White Shield were only a figure I picked off the top of my head. For all I know, he owned less than 10%, whatever his ownership might have been.

Q Yes, but you didn't think to inquire?

MR. BAYDA: Objection.

Q Is that correct?

A No.

Q You did not inquire?

A No, I did not. There again, I just asked questions that I felt were important, nothing else.

Q Did you inquire as to why he was selling any shares on a distribution?

A Making reference to what offering? The offering he called me on or --

Q No. Any offering. You knew he was selling some shares pursuant to distribution, is that correct?

A This was not a distribution, to my knowledge. Here, again, relating to -- getting to the 150,000 shares of stock, the word distribution never came up. If you're making reference to the Leason offering, whether he said he sold stock through Leason, which to me then is a distribution, then I

know only because what he told me.

Q It was a distribution because it was sold through Leason or why?

MR. BAYDA: Objection.

A I only knew that he was selling stock through Leason because he told me. I never, here again, I never saw a prospectus until much later, a later date after the trade took place. And I knew nothing about Santangelo.

Q Santangelo never offered you a red herring?

A To my knowledge, he did not.

Q Did Ross offer you a red herring?

A Conversation -- no, he did not. Conversation with Ross was just a trade, and nothing else I remember.

Q He testified he offered you a red herring, and you said you had a red herring.

A He might have stated it to Ron, but he never stated it to me.

Q Do you have anyknowledge of Ross having spoken to Ron Lattuga?

A Ron spoke to him at one time or another, yes, he did.

Q On this transaction?

A Prior to the settlement date, he called Vin Ross and told him we weren't going to accept the stock. I don't

ever recall having a conversation with Vin Ross prior to the trade.

Q Were you ever employed by Singer & Mackie?

A No, I was not.

Q Whom did you deal with at Singer when you called them about taking some of this stock?

MR. BAYDA: The witness did not testify that he called anyone at Singer.

Q I beg your pardon. I withdraw the question.

Who called Singer and Mackie?-

A Ron Lattuga.

Q Have you any idea to whom Lattuga spoke?

A I have no -- Ron probably -- if I had to make a supposition, I could --

MR. BAYDA: He asked, to your knowledge.

MR. GREEN: Do you know?

A Do I know?

Q Yes.

A No.

Q You do not.

A No.

Q Now, then, is there anything in the statement you gave to Mr. Green in June or July, 1971, as to which you have not testified here today?

A I don't know. You tell me, Leo.

Q I haven't seen the statement.

A I have answered all the questions I believe you have asked me. And I believe that whatever was in the statement, I have just about brought up here, yes.

Q Alright. Now, you did see this statement within the last month, is that correct?

A Yes. Two weeks ago, I believe it was.

Q Two weeks ago. And you reviewed it?

A Yes.

MR. DUFF: Now, I ask, again, Mr. Bayda, for production of the statement pursuant to the demand we made in our interrogatories.

MR. BAYDA: And you have already received an objection. That was quite some time ago.

MR. DUFF: I understand that.

MR. BAYDA: And I believe the ground was stated.

MR. DUFF: I ask for its production again. And I will at this point, I will make a motion for a ruling on that. I will not conclude my deposition of Mr. McMillen until such time as we have had a ruling. It is a contemporaneous or approximately contemporaneous statement --

MR. BAYDA: Well, I believe the witness testified

it was prepared some time in July of 1971. I don't know what you mean by contemporaneous. But this trade occurred on June 7, 1971. If that's your definition of contemporaneous.

MR. DUFF: Well, one month is more contemporaneous than almost 2 years.

MR. BAYDA: Well, I believe the objection taken was based on the ground that this was material prepared in anticipation for litigation.

MR. DUFF: Is that why this was shown to this witness two weeks ago?

MR. GREEN: May I ask a question? Should I call Lattuga while you two are going through this?

MR. DUFF: Yes. You might as well. Off the record.

(Discussion off the record.)

MR. DUFF: I take it you're refusing it because it is material prepared for litigation?

MR. BAYDA: That's correct. That's correct.

MR. DUFF: And I take it it was prepared for Mr. Green at his request, is that correct?

MR. BAYDA: You'll have to ask the witness. I don't know.

Q Who requested you to prepare a statement?

A Mr. Green.

Q And did you submit it to Mr. Green or to Mr. Lattuga?

A Mr. Lattuga.

Q Mr. Lattuga asked you?

A Oh, no. You asked who submitted it to Ron. Ron submitted it to Marc Green, yes.

Q To the best of your knowledge, who made the decision on behalf of Faulkner, Dawkins to refuse this trade?

A I have no idea, Leo. I really don't.

MR. DUFF: Well, for the record, Mr. Bayda, I do not regard this statement as material prepared for litigation, in view of the fact that it was Mr. Green who your answers to interrogatories disclose made the decision as principal for Faulkner, Dawkins to refuse the trade. He was not acting as an attorney regardless of any legal knowledge he may have.

MR. BAYDA: That's quite correct. But the testimony was that this memorandum was prepared after that decision was made, after the trade was refused.

MR. DUFF: That's something which we will have to have a ruling on. Alright, subject to that ruling and any questions which may flow from a direction to produce such a document, I'm finished with the witness.

A That's correct.

Q As to that confirmation, what is your understanding -- the confirmation by telephone by Vin Ross, that confirmation, as to that confirmation, what was your understanding as to whose shares you were buying?

A I was buying shares of stock that -- of a group that Mr. Santangelo was representing.

Q At that point --

A Or a corporation, whatever it may be.

Q At that point in time, you understood that's what you were buying?

A That's correct.

Q Aside from knowledge you have gained lately as to who was in the group?

A That's right.

Q Or how big the group was, what sort of group it was, at that point in time you knew it was a group?

A That's correct.

Q When was the first time you met Mr. Byrnes?

A The only time I met Mr. Byrnes was when the trade was -- when it was decided on not to accept the delivery of the stock. And I thnk a few days after, here, again, this is all recollection on my part, I couldn't be specific with you, he came up, Mr. Byrnes came up with Vin Ross and Frank

Santangelo. And, here, again, to me, Mr. Byrnes' face was a blank. I wouldn't remember the name until it was mentioned to me.

Q Had you talked to him before that?

A I never spoke to him at all, to my knowledge. I never spoke to the man.

Q Had you heard his name before that?

A No sir, I did not.

Q Now, we have had some testimony, which I'm not sure I completely understand, this morning, that in conversations between you and Mr. Santangelo prior to the trade, and by that I mean prior to the 7th of June, he told you that he owned some stock which was being sold as part of a distribution and that --

A Here, again, the word distribution never came up.

MR. GREEN: Let him finish.

THE WITNESS: I want to say it, Marc, I'm sorry.

A Go ahead.

Q (continuing) -- and that he also owned some White Shield shares, which he was offering to you, which were not a part --

A Of the secondary.

Q I'd like to use your words: of the secondary.

A Right.

Q Now, by that information which I gave you, did you understand that he was talking about one particular secondary, to wit, this Leason secondary we have talked about earlier?

A Yes. Yes. The Leason secondary, that's right.

Q Now, it's not clear to me, and I think you can clear it up, did he indicate to you that the shares he was offering to you were being offered apart only from the Leason secondary or apart from all registration?

A My understanding was that it was being offered apart from the Leason secondary. I was not aware of the three other registrations he made reference to. (indicating.)

Q If that was your understanding, then, would it be correct to say that he never told you that the shares he was offering to you were being offered apart from any registration?

MR. BAYDA: Would you read that question back, please?

THE WITNESS: Yes. I didn't understand it.

(Question read back)

MR. MARSHALL: I can clear that up.

Q By "any," I'm saying, he never told you that the shares he was offering to you were apart from, and that's your word, apart from, I think by that you mean outside from,

outside from or apart from not only the Leason secondary but from any and all other registration?

A Here, again, you know, not to be repetitious, Leo made mention of the fact there were three other registrations that were offered that Friday, which I wasn't aware of, plus the Leason offering, and I have to -- I don't know. Rephrase the question again, if you don't mind.

Q I would be happy to.

MR. BAYDA: The witness has already testified that he had no knowledge of any further registrations--

MR. MARSHALL: I'm having trouble, maybe because of looseness of language. But this morning we have had testimony which I think I can sum up or characterize as the shares he was offering to me were apart from the secondary or the shares that he was offering to me were apart from a secondary or apart from distribution or apart from registration. I don't think that's been clear.

MR. BAYDA: Yes. But the witness did not know, the witness testified that he didn't know before today that there were other registrations. And he also testified that he asked if this was clean stock, and was told that it was.

MR. MARSHALL: I'm not asking if it was clean stock.

MR. DUFF: Are you testifying for him?

MR. BAYDA: I'm not testifying for him. I'm telling you what he testified to this morning. The witness testified that he had no knowledge of any other registrations until today.

MR. MARSHALL: That has nothing to do with the question I'm asking him. I'd like to pursue the three or four remaining questions I have, because I think it's unclear to everybody here exactly what he understood by these matters, such as clean, clear, registration, distribution.

Now, I don't promise that it is going to be completely clear after I have questioned him, but it'll be a little clearer at least to me.

A Please rephrase your question. Please repeat your question, then, okay?

MR. MARSHALL: Can we hear it back, the last question.

(The last question was read back.)

Q Now you have asked me to rephrase that. I'd like to rephrase it, if I could, by referring to paragraph 6 of the affidavit you signed on May 3 of this year, in which -- let me go back to paragraph 5. In paragraph 5, you say, and I'll characterize your words a little bit, that you had

become aware that a registration statement had been filed with the SEC by White Shield to register a secondary distribution.

Now, first of all, before I go back to my original question, let me ask you, as to paragraph 5, are you referring in paragraph 5 to the "so-called Leason distribution"?

A Yes, I am.

Q Fine. Now, in paragraph 6, you say several other things, but you end the paragraph by saying--no.

You say, as follows, I specifically asked Mr. Santangelo in one of our telephone conversations prior to June 7, 1971, whether his shares were part of the registered distribution.

Now, my question as to that statement is, by the registered distribution, are you once again talking about the distribution talked about in paragraph 5, which is again the so-called Leason distribution?

A Yes, I am.

Q Immediately after that statement in paragraph 6, you say that he answered that his shares were not part of the registered distribution.

Now, going back to my original question, it seems to me that by this sworn statement you have said that Mr. Santangelo specifically told you that the shares he was

offering to you were not registered as part of the Leason distribution.

A That's correct.

Q My question is, did he ever tell you that they were not part of any other registered offering?

A Never did.

Q Did he ever imply to you that they were not part of any other registered offering?

A To the best of my knowledge, no.

Q I think a fairer way of saying this is did you ever infer from anything he said to you that they were a part of a registered offering?

MR. BAYDA: Well, I don't know if that's a fair way to infer anything.

MR. MARSHALL: I'm trying to be a little more fair to the witness. I'm not asking him to give me now a judgment on what was in Mr. Santangelo's mind, I'm asking him to give me a recollection of what was in his mind, and, therefore, I said, but did you infer.

MR. BAYDA: Well, I think you're entitled to ask him what was said.

MR. MARSHALL: And I'm entitled to ask him what conclusion he drew from what was said.

MR. BAYDA: Well, then, I object to it.

MR. DUFF: The objection is on the record. Can you answer the question.

THE WITNESS: I have forgotten the question.

Q I think the question has been answered to my satisfaction. I asked you did you ever infer from anything that Mr. Santangelo said to you prior to the 7th of June, that the shares which he was offering to you -- well, I'm not sure how I asked it.

MR. MARSHALL: Can we hear it back?

(The question referred to was read back.)

A No.

Q Did you ever infer from anything he said to you that they were not part of any registered offering, other than the Leason offering, which, as I understand it, you knew they were not part of?

A No.

Q You had made no inference either way?

A That's correct.

Q Referring again to your statement in paragraph 6 of the affidavit of May 3, 1973, and you can look at this, Plaintiff's Exhibit 2 for identification.

A I'll take your word for it.

Q You start the statement in paragraph 6 by saying, because Faulkner was a market maker in the common stock of

White Shield, etc., I specifically asked Santangelo whether his shares were part of the Leason distribution.

Now, when you say, because Faulkner was a market maker, was there any other reason that you would know of now why you would ask him that?

A No, no other reason.

Q There would be no reason for you to ask Santangelo whether or not his shares were part of the Leason distribution?

A Oh, I see what you mean. Yes, there would be, because of the fact the involvement would take us out of the sheets as a market maker. We would no longer be able to perform effectively as a market maker.

Q It seems to me you're repeating, because you're a market maker you had to check to see if he was part of the Leason distribution.

A Yes.

Q Now, what I have asked you is, aside from that, is there any other reason why you would ask him if he was part of the Leason distribution?

A The other reason being that since it was a sizable amount and he was waiting for SEC clearance, I felt as though I had to ask if it was good, clean stock to enable me to perform and function as a market maker in this particular stock.

if and when I did buy that stock.

Q Fine. As I understand it, then, to the extent that we have talked this morning about SEC clearance, one of the reasons why you might ask him if he were part of the Leason distribution would be as a part of your determining whether or not this was "good, clean stock," right?

A Yes.

Q And, now, also as part of your determining whether or not this was good, clean stock, might you ask him, Mr. Santangelo, or the seller, in a hypothetical case, whether or not his shares were part of any distribution or of any registration, aside from the Leason?

I'm just trying to exclude the Leason distribution which you were aware of. And I'm saying, as part of determining whether or not you were getting good, clean stock, would you, might you, you can characterize it any way you want to, ask the seller if his shares were a part of a registration?

MR. DUFF: Excuse me. Are you asking hypothetically? Because I think the witness has already answered the direct question.

A Yes, that's what I was going to say.

THE WITNESS: Thank you.

MR. MARSHALL: I don't know if he's answered it

for you. He's answered the direct question for me as to whether or not he did, in fact, as to Leason. Now I'm trying to say, aside from Leason.

Q I'll ask it both ways. And I did mix them up.

In fact, did you ask Santangelo in this matter whether or not his shares were a part of a distribution which was not the Leason distribution?

MR. BAYDA: The witness has already testified that the term distribution was never used.

Q Did you in fact ask Mr. Santangelo if the shares he was selling to you outside of the Leason secondary were part of any other registration?

A No.

Q You did not.

Now, let me go back to my hypothetical question.

Would you, as part of what I take it to be your task, to determine whether or not this was "good, clean stock," would you in a typical situation, a typical sale of this size of shares, be likely to ask the seller if his shares that he was selling to you were a part of a registration?

A Would I, as a matter of routine question?

Q Yes, as a matter of routine in a situation of comparable size.

A No.

Q You would not be likely to ask him that?

A No.

Q But I take it that in a situation of this size, as a routine matter, if you did know, you happened through your normal business to have heard of a registration of his shares, then you would ask him as to whether his shares were selling you were part of this particular registration that you did know of?

A That's correct.

Q If you knew of none, you wouldn't be likely to ask him?

A That's correct.

Q Now, we have also had testimony that, and I'm not sure how far we have gone with this, but we have had testimony that Mr. Santangelo told you at a certain time, or I guess at several times, that he was waiting for, I think it's fair to use your words, SEC clearance.

A That's correct.

Q As to the shares which he was offering to you. What do those words SEC clearance mean to you?

A Well, that he had stock in registration with the SEC waiting for a formal letter of the stock to be sold in the Street, that's what it meant to me. Or waiting for word from

Washington that the stock could be sold.

Q So when he talks to you of SEC clearance, the several times he used that phrase to you, or some comparable phrase, that meant that his shares were in registration and he was waiting for the SEC to clear that registration and allow those shares to be sold?

A That's correct.

Q Well, if I understand you, then, it would seem to me that the first time that Santangelo used the words to you, SEC clearance, and told you he was waiting for that, then at that point you realized that the shares he was selling to you were in some form of registration with the SEC, is that right?

A That's correct.

Q Now, when you realized that the shares you were buying were in registration with the SEC, did it occur to you that you should ask for a prospectus for these shares?

A No, it didn't occur to me.

Q Now, if we're talking about the time prior to when this "SEC clearance" is given, then I would assume that the sort of prospectus we would be talking about would be preliminary prospectus or a red herring.

A Red herring, correct.

Q Now, did it occur to you that you would or should

ask for a red herring as to these shares?

A No, it did not.

Q In your normal function as a trader, if you were negotiating for the purchase by Faulker, Dawkins of shares that were in registration with the SEC and which had not yet been cleared by the SEC in this registration, would it be your normal job to ask for a red herring?

A Repeat the question again, would you please?

MR. MARSHALL: Could you read it back, please?

(Question read back.)

A No, it is not my normal job to ask for a red herring.

Q Whose job would it be?

A Well, it would be the job of the underwriting department, I would assume.

Q And how would they know that you were making this purchase or negotiating for this purchase?

A Tell them.

Q You would tell them?

A I would have to tell them, right?

Q Did you tell them in this case?

A I told my immediate boss, Jack Cirenza, about it.

MR. DUFF: What was that word? Off the record.

(Discussion off the record.)

Q You told Cirenza you were negotiating for this purchase. Did you tell him that the shares were in registration?

A I'm not aware of whether I said it or not, no.

Q Alright, well, as I understood or as I remember and understood your testimony earlier this morning, when you told Cirenza about this purchase, and, as I understand your testimony now, you don't remember whether you told him that it was a purchase of shares which were in registration, but when you --

MR. BAYDA: Would you tell the witness what you mean by the term, in registration?

MR. MARSHALL: I will.

Q I mean by it only what you meant by it when you told me, when you described to me what it meant to you that you were waiting for "SEC clearance".

A I wasn't, Santangelo's awaiting SEC clearance.

Q Right. And you were in turn waiting for him to get it. That's what I mean by "in registration".

A Okay.

MR. BAYDA: Then you don't mean by "in registration", shares included in a registration statement filed under the Securities Act, or do you?

MR. MARSHALL: Well, that's what the witness told

A Not unless the buyer is aware of the fact that a prospectus is involved and follows the stock itself.

Q You testified that you informed Mr. Cirenza that this stock being purchased from Mr. Santangelo was part of a cleanup.

A Yes. Mr. Santangelo stated that he had 150 shares of stock to sell, he had a hundred some odd placed with institutions and that this was the tail end or cleanup of that piece. That's why we thought we could make the trade cut.

Q Well, did Mr. Santangelo ever tell you that this stock would be delivered with a prospectus?

A I don't recall.

Q Did Mr. Santangelo ever discuss with you a prospectus other than this prospectus included in the Leason registration which you talked about?

A I don't recall. I don't recall.

MR. BAYDA: I have no further questions.

EXAMINATION BY MR. DUFF:

Q When did the name Leason first appear in your conversations with Mr. Santangelo.

A Oh, if I had to pick a time, Leo, I would have to say, the first day of conversation with him, before the fact that we knew of the Leason offering.

Q You knew of it before you spoke to him?

A Every y knew of it.

Q Is it fair to assume you raised the question first?

A I would say, yes, it's fair to assume that.

Q Is it fair to assume you asked him, is this stock you're offering us part of the Leason distribution?

A I think I stated that I did ask him that question.

MR. BAYDA: I believe he testified that he never used the word distribution.

MR. DUFF: We have been through that countless times. If you wish to note, your objection on the record. The witness has just testified that that was substantially what he said.

Q Now, and what did Mr. Santangelo say in response to that inquiry?

A No, this was not part of--now, here, again, this is only words I recall, I'm saying, that, no, this is not a part of, this is away from the Leason secondary.

Q And you made no other inquiries as to any other secondary or any other distribution of White Shield stock?

A I was not aware of the fact that there were any other distributions, to use your word, or any other offering of Leason--of White Shield secondaries or whatever other than the Leason secondary, which I--

Q But, Jim, the answer to the question is, you did

not ask him about any other. I understand you didn't know of any other. The question was, you did not ask him about any other secondary?

A No, I did not.

Q And he did not answer falsely that he was not part of any other secondary, did he?

A If I didn't ask the question, how can he answer it?

Q Precisely. Now, I think you earlier testified that in this conversation, or one of those conversations you had on that day or the following day or the day after, he had mentioned to you that he had had some stock on the Leason registration or the Leason distribution, is that a correct recollection?

A Yes, he did make that statement, that he did sell stock in the Leason offering, yes.

Q Are you quite sure that he mentioned the Leason offering? Is it not possible that you might not have misunderstood him?

A Leo, I asked the question specifically about the Leason secondary.

Q The first time?

A Yes.

Q And he told you he was not part of the Leason secondary?

A This stock was not part of--the stock he was offering me, the 44,000 shares of stock which he was offering me was not part of the Leason secondary.

Q Well, you weren't interested, were you, Jim, in any stock he might have sold previously? You were only interested in the stock he was selling to you, is that not correct?

A Leo, he initiated the conversation with regard to the fact that he had stock for sale.

Q Correct.

A Through the Leason secondary.

Q Then you asked about Leason?

A No, I asked about Leason and he stated to me--

Q That he was not selling you stock under the Leason secondary?

A But that he had sold stock through that Leason secondary.

Q You're quite sure he said that?

A He said, if you'll look in the prospectus, you'll see my name. This is the statement I believe I made to you where you might have--

Q I'm trying to--I'm not questing your word, only your recollection.

A I understand. I understand.

Q If you look in the prospectus, he said, you will see my name. Did he say, if you'll look in the Leason prospectus?

A My assumption would be that he was making reference to the Leason prospectus, yes.

Q It would be your assumption?

A Right.

Q And it would be your assumption whether or not he actually said, if you look in the Leason prospectus, isn't that correct, because you only knew of one prospectus on June the 4th, June the 3rd and June the 2nd?

A That's correct.

Q Now, in fact, are you now aware that Santangelo sold no stock whatever under the Leason prospectus?

A I wasn't aware until you just mentioned it.

Q You're still not aware. I just asked a question.

A Correct.

Q Now, if I told you that in fact Santangelo and the people for whom he was selling or for whom he was attempting to sell stock to you, had never sold under the Leason prospectus, would that possibly suggest to you that you might have misunderstood and that what Santangelo in fact told you was that he was selling stock under a prospectus, but not the Leason, without ever mentioning Leason?

A Well, I mentioned the Leason name, I had stated.

Q Yes, you mentioned the Leason name in your first conversation. You asked him, is this part of the Leason distribution, or the Leason registration. And he said, no, it is not. And then you testified earlier, and I think you testified under a misapprehension of what was passing, that he told you he had sold stock under the Leason registration?

A Yes.

Q Now, if in fact he had not sold--what I'm trying to suggest to you is that, you may have assumed when he mentioned selling stock under a registration that he was talking about Leason because at the time you didn't know of another registration.

A I didn't know of another registration, no.

Q Well, then, is it possible that you had misunderstood what he said and yourself raised the word Leason when he said, I'm selling stock under another registration or I'm selling stock under a registration?

A Leo, I tell you, to the best of my knowledge, he said that he did sell stock on the Leason secondary. Now, you're telling me something that you have the facts on, that what you have is the fact, that he did not sell it. There, again--

Q When did he tell you this?

A I would have to assume--

MR. BAYDA: Tell him what?

Q That he sold on the Leason secondary.

A I would have to assume in one of our first two conversations.

Q Well, in the first one, he told you he was not selling you stock on the Leason distribution, is that right?

A That's correct.

Q Or secondary?

A Whatever. Okay.

Q Is that right?

A Yes, okay.

Q And at that time you had to go back and check with somebody else, did you not?

A Yes.

Q So that there was really no further discussion at that moment. In fact, you subsequently, if I recall, called him back that day, after speaking to somebody, Jack Cirenza.

A Right. I asked him--going through the motions of asking the questions.

Q Okay. Now, there was no occasion for you to ask again whether this was coming to you from the Leason distribution, he had already told you that, isn't that correct?

A Yes. My belief is that he had told me that, yes.

Q So, there was no--you, presumably, you don't enjoy hearing yourself talk to ask him a second time within a couple of hours, is that correct?

A Yes.

Q Now, do you believe that conversation respecting this Leason distribution, the second one, occurred in this particular second conversation on June the 2nd, Wednesday?

A Leo, I don't know when it came up. But I'm sure it was in one of our first conversations. I couldn't tell you, first, second or third. I know it came up in one of our first conversations with him. There, again, you know, I don't know whether it took place on a Wednesday or a Thursday. But I would have to assume, here, again, trying to recall as much as possible--

Q It's difficult.

A Yes. (continuing) --that it had to take place in the first day. But it could have been the second day. I'm not trying to hedge myself, believe me. I'm just trying to tell you what I recall.

Q In the course of your conversations with Santangelo on the second, third, fourth or seventh of June, did he at any time mention that before he could sell to you, he had to check with another potential buyer, Havenfield Corporation?

A Assuming, now, here, he told me he had over 100,000

sold, but mentioning names, I don't know, really. I know the name Havenfield is a broker.

Q As a former broker?

A Former, right. I'm sorry. But, Jesus, I don't recall the name coming up, honestly, I don't.

Q Was there any mention of any possibility of someone else wanting these 44,000 shares?

A I don't remember. I don't remember him saying anything.

Q Mr. Santangelo testified, and Mr. Ross confirmed in his testimony, that on the 7th, you called him. And on the first call, he said, no, we're not effective yet; or, if you prefer, no, we're not clean yet; or, we're not out of registration yet, depending on whose testimony you're focussing, call me back, or, I'll call you when we're out.

And then you called back, is their testimony.

And Santangelo claims to have said to you, and Ross being in the same room, agrees, that he said, I'll have to call you back. I have another potential buyer.

Have you any recollection of that? And then subsequently either you called again or he called you, and he said, you can have the shares.

A The answer is, no.

Q You have no recollection, was the question, is that

right?

A That there was that much conversation back and forth, no, I don't recall.

Q Was it your assumption then that you were the only buyer for this 44,000, the only prospective buyer?

A Yes. Yes.

Q On what did you base that assumption?

MR. BAYDA: I object.

A I based it on the assumption that I kept calling him every day, and the conversation went back and forth. And I believe that I was the only buyer. And that as soon as the stock was free and clear to be sold, that I would be the owner, yes.

Q You called him every day, and every day he refused to sell to you because he wasn't clear yet?

A Not that he refused.

Q He couldn't?

A He couldn't.

Q He would not go through with the--you were anxious to get the deal, were you not?

A Yes, I was.

Q And the man kept saying, no, I'm not clear, or I'm not free, or I'm not out, or whatever words he used, he repeatedly refused to go through with the deal, whatever his

reasons were?

A Right.

Q Now, two days before the settlement date, Lattuga told you he had heard, as you testified earlier, that Tobey & Kirk were selling unregistered stock and as you testified on recross, on cross, that they were selling secondary stock?

A Yes.

Q Have you any recollection what the market price of White Shield was on that day?

A No sir, I don't.

Q Was it above your purchase price or below it?

A Leo, I couldn't answer you, honestly.

Q You're not aware that the market fell out of bed on or about June 8th?

A I have no idea.

Q You have no recollection?

A Really, I don't.

MR. DUFF: I have no further questions at this time. Subject to the ruling.

EXAMINATION BY MR. BAYDA:

Q You testified that in one of these telephone conversations prior to the trade with Mr. Santangelo, Mr. Santangelo referred to a prospectus with his name in it. Did he tell you in this particular conversation that the stock beir

sold to Faulkner was outside of that, that it had nothing to do with that?

A Yes, he did.

MR. BAYDA: I have no further questions.

EXAMINATION BY MR. DUFF:

Q You're quite sure of that?

A Well, let me answer your question in another way. I put the question to him.

Q What question did you put to him?

A Whether or not this was part of the Leason secondary. Or if the stock that he was selling was away from that Leason or a part of--apart from the Leason secondary. He said, yes.

Q And that was what you answered Mr. Bayda's question?

A Yes.

MR. DUFF: Okay. Thank you very much.

(Whereupon this Deposition was adjourned.)

(Time noted 1:40 p.m.)

_____

Subscribed and sworn to before me

this _____ day of _____ 1973.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x

THOMAS J. BYRNES and FRANCIS R. SANTANGELO,

Plaintiff,

-vs.-

FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC.,

Defendants.

73 Civ. 670
M.I.G.

- x

FAULKNER, DAWKINS & SULLIVAN,

Counterclaim-Plaintiff,

-vs.-

THOMAS J. BYRNES, FRANCIS R. SANTANGELO and TOBEY & KIRK,

Counterclaim-Defendants.

- x

CORRECTIONS AND CHANGES TO DEPOSITION OF JAMES McMILLEN, dated June 4, 1973

Page 18, Line 21 --- The Answer should be changed to read, "Good clean stock is stock which I, as a market maker in said stock, would be able to sell and still continue to be a market maker.

Good clean stock is stock which bears no legend restricting its sale nor is it stock which is part of a distribution requiring an accompanying prospectus when sold.

This was my understanding of good clean stock prior to, during and since the trade in question."

Page 118, Line 13 ---- The Answer should be changed to read, "No, if Mr. Santangelo had told me that the stock was to be delivered with a prospectus, there would have been no trade, I would not have purchased stock to be delivered with a prospectus as I would then have to cease being a market maker in order to sell the same."

James McMillen

Sworn to before me this 22nd day of January, 1975.

Barbara Andriani

BARBARA ANDRIANI
Notary Public, State of New York
No. 24-6002840
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1972

Q Prior to your employment at Singer, how were you employed?

A Gregory & Sons.

Q And what was your employment there?

A Six years OTC trader and four years--about one year assistant trader and three years teletype operator.

Q Three years?

A Yes.

Q So you were with them for approximately ten years?

A Yes, sir.

Q That takes us back to 1959 or thereabouts.

A Right.

Q And were you previously employed in the securities industry?

A I goofed there a year, I missed somewhere. I got out of the U. S. Air Force in 1958.

Q But those are the three essential employments you've had to date?

A Yes, sir.

Q Now, prior to the commencement of this deposition, did you have a conference or luncheon conference or a meeting with Messrs. Bayda and Green?

A Did I ever talk to them prior to this?

Q Today.

A Today?

Q Immediately prior to the commencement of this deposition.

A They had lunch and I had a beer with them.

Q Was Mr. McMillen with you at that lunch?

A Yes, sir.

Q Did you discuss Mr. McMillen's testimony that he had given this morning and early afternoon?

A Briefly, one question. Mostly about today's market.

Q All right, what was the question regarding Mr. McMillen's testimony which you discussed?

A In reference to the word clean stock.

Q I see. And what was said to you and by whom about clean stock?

A No clear-cut answer. We were just discussing what clean stock means to each one of us.

Q And what did clean stock mean to you at this meeting?

A Clean stock to me is, well, what the whole purpose of the thing is here, I guess.

Q I'm sorry.

A Clean stock would mean, I guess, stock that is

original June 7th transaction.

Q So some time in May, early May, mid-May, thereabouts, you heard there was to be a secondary?

A Yes, sir.

Q Now, at Faulkner, how many traders were there at that time?

A Counting my supervisor, four.

Q Four?

A Yes.

Q Was Faulkner making a market, I'm not sure I asked this question yet, let me ask it directly, was Faulkner making a market in the stock of White Shield at about that time?

A Yes.

Q Was Faulkner making a market in any other securities?

A Oh, sure.

Q Was there any sort of division of responsibility among the four traders as to one stock or another stock? Was anyone more of a specialist in a given stock than in another stock?

A Yes, I think we all traded our own stocks, our own group that wewere responsible for.

Q Did you regard White Shield as being in your

group of stocks?

A Yes, sir.

Q Would you say you were primarily involved in the trading of White Shield for Faulkner, Dawkins?

A I was the trader in White Shield.

Q You were the trader. I assume there were, however, isolated transactions that came to Faulkner through other traders?

A I don't follow that question.

Q Well, not every transaction in White Shield came to Faulkner through you, is that correct?

A If you mean like if I was in the men's room and someone came in with 500 White Shield, someone else naturally could say, 500, I buy, or 100, of course.

Q How about something larger?

A No. Naturally, my immediate supervisor could.

Q As the trader who was specializing in the stock of White Shield, did you at any time make any efforts to ascertain the status of any registrations or distribution in that stock?

A No, sir.

Q You did not? Did you at any time attempt to acquire for Faulkner a red herring with respect to any such distribution?

A No.

Q When you heard in May of 1971 that there was to be a distribution, you made no effort to obtain from White Shield Corporation or anyone else a red herring applicable--

MR. BAYDA: The witness has already answered that he did not.

MR. DUFF: That is true. I just want the record to be very clear on that.

Q Did there come a time when you learned that Francis R. Santangelo might be interested in selling some White Shield stock to Faulkner?

A Did there come a time?

Q Yes.

A Of course.

Q Yes?

A That's right.

Q When did you first learn of such an interest on Mr. Santangelo's part?

A His original call was to the head of the Block Department.

Q And who was that?

A Jay Vanneck. I don't know how to spell it.

Q And what happened after Mr. Vanneck received

a call from Mr. Santangelo?

A He turned it over, the original phone call, either over to myself or Jim McMillen, I don't recall which. The first call. I think I had one, maybe two conversations with Mr. Santangelo.

Q Prior to the trade?

A Prior to the trade.

Q Well, Mr. McMillen has testified that he was the first, as between you and himself, to speak with Santangelo. Does that refresh your recollection?

A That would seem correct. It was either one of us, I really don't recall which.

(Continued on page 14.)

RG1

Q Have you any recollection of the first conversation you had with Mr. McMillen regarding Santangelo?

A No. Jimmy told me that Santangelo was a seller of White Shield, he had roughly 100,000 shares, 55 were spoken for by a bank or institution, I don't remember which, or he might have said both.

And there was 44,000 for sale. He had to get SEC clearance before he could sell the stock.

Q That's what McMillen told you?

A Yes, sir.

Q What did you understand that phrase to mean, SEC clearance?

A That he wanted to make sure he could sell this stock and in no way, to my recollection, and in no way be involved in this secondary.

Q Now, which secondary are we speaking of?

A The one that was coming out then. I only thought there was one.

Q In other words, prior to the sale on June 7th, is it your testimony that you knew of only one secondary?

A Yes, sir. I talked to Mr. Santangelo myself about that.

Q Well, let's take it one step at a time.

A Okay.

Q You knew of only one secondary?

A Right.

Q And prior to your firm's agreeing to buy 44,000 shares of White Shield, you had never obtained a copy of the red herring pertaining to that secondary; is that correct?

A No, sir.

Q Now, after McMillen had spoken to you about Santangelo and Santangelo's desire to sell 44,000 shares, what happened next involving you and Mr. Santangelo?

A The stock was around $10. I think the next day there were buyers all over for it. There were buyers everywhere for the stock.

To the best of my recollection, I think that was the day I called Mr. Santangelo and told him the stock had moved up, probably like 11, and we were prepared to buy the stock.

He said, no, he still had not gotten SEC clearance. That was the day I asked him if this was clean stock and had anything to do with the secondary distribution.

Q Can you pinpoint for us when this conversation took place?

Let me, to help refresh your recollection, if it

does, the sale was on Monday, June 7th.

A It had to be the week before.

Q All right. Now, Mr. McMillen's testimony and, again, he wasn't absolutely certain, but he was fairly clear that his first conversation with Francis Santangelo was on or about Wednesday, the 2nd of June 1971.

A I think he'd be wrong.

Q You think he would be wrong?

A If you say the sale appeared on a Monday, that would have left it Wednesday, Thursday and Friday. I would guess, Tuesday.

Q Tuesday, June the 1st?

A Monday or Tuesday, I would think is the original call to Jay Vanneck came in.

Q We're talking now about the first call between McMillen and Santangelo?

A Well, that would have to be the call to Jay Vanneck. Jay Vanneck turned it over to McMillen.

Q I think McMillen testified, I'm not sure, that Vanneck said he would have McMillen call back or else give McMillen's name to Santangelo and Santangelo called him.

A Either way, it was the same day.

Q It was the same day, all right.

So that would then be the 31st of May or the 1st

of June; is that right?

A Yes.

Q Now, taking that calendar, when would you assume was the first time you spoke to Santangelo?

A I would have to say it was the day after, or no later than the second day after those telephone calls.

Q So you are saying, in substance, that your conversation, first conversation with Santangelo was probably on Wednesday, the 2nd?

A Wednesday or Tuesday.

Q Tuesday.

Now, when you had discussed this with McMillen prior to your first conversation with Santangelo, had you discussed a secondary with McMillen?

A No.

Q You had not asked McMillen whether the stock being sold was part of a secondary?

A Oh, oh, oh. I didn't understand you. I thought you meant we just discussed was there a secondary involved.

No, Jimmy said that it was clean stock. He had to get some sort of clearance from the SEC. And that's about all I remember. There might have been more, but I don't remember the conversation.

Q Okay. Now that brings us to your first conversa-

tion with Mr. Santangelo.

Can you possibly recall how that conversation came about? Did you call him or did he call you?

A I think I called him to tell him the stock was higher and that we could--we could probably like maybe buy the whole thing right then and there the way it looked.

The stock was acting fantastic.

He said, no, he had not gotten clearance yet from the SEC to sell the stock.

And then I discussed with him clean stock.

And he said, yes, it was clean, it was not part of the secondary distribution.

Q Now, instead of saying, "I discussed with him clean stock," can you reconstruct for us what you said to him and what he said to you? I realize this is two years ago.

A To the best of my recollection, I asked him if this was clean stock.

Q "Is this clean stock"?

A And he said, yes, it was, it was not part of the secondary.

Q Well, now, who first mentioned the secondary?

A I did.

Q Okay. Then what was your question to him?

A I just said it.

Q No, you gave us a question and then you gave an answer which for the first time raised the secondary. I'm trying to--

A I said to him, "Is this clean stock?"

Q And he said?

A "No."

Q He said, it is not clean stock?

A It is not part of any secondary distribution.

Q So you never mentioned the words secondary distribution, it came up in his answer to you; is that right?

A To the best of my recollection. And I thanked him for telling me that.

MR. DUFF: I'd like the answer read back.

(The answer was read.)

Q You thanked him for telling you that it was not part of any secondary distribution?

A Yes, sir.

Q Did you ever mention the name Leason & Company in your conversation with Santangelo?

A No, sir.

Q Did McMillen mention Leason & Company in his conversation with you?

A I would have no idea between the phone conversation.

Q Sorry, I don't follow the answer.

A Do you mean like was I standing there when Jim was talking to him?

Q No, when he was talking to you. When McMillen was talking to you.

A I really couldn't say I remember. I could not remember, really, if he mentioned Leason's name.

Q Now, you testified that you had more than one conversation with Santangelo.

What was the occasion for your second conversation with Santangelo?

A I said I had one, probably two. Since it was two years ago, I could not be honest and say there was a second. I might have got on the phone another day and said, "The stock is up again."

And he might have given me the same answer. Or it could have been that he told Jimmy this and I think he made the phone call, you know. One of us I know spoke to him again.

I recall the original conversation. I thought I made another phone call with him and he gave me the same answer, that he had not gotten clearance yet.

affidavit executed by you in this action on the 7th of May, 1973, and I ask you if that is your signature.

A Yes, sir.

MR. DUFF: Would you mark this Plaintiffs' Exhibit 3, please, for identification.

(Affidavit executed by Mr. Lattuga in this action on the 7th of May, 1973 marked as Plaintiffs' Exhibit 3 for identification, as of this date.)

Q Now, sir, this affidavit which you prepared, I'm sorry, this affidavit which you signed, did you prepare it yourself?

A I had help from--in the wording of it from Faulkner's leading counsel.

Q Isn't it a fact that the affidavit was prepared by Faulkner's attorneys, Jacobs, Persinger & Parker, that you then consulted as to its contents, that the affidavit was prepared for your signature and then adopted such changes as you suggested?

A I recall writing it on a yellow scratch pad two years ago. And then it was given to our counsel, who changed the wording, spelling corrections, et cetera. And then I signed it.

Q Now, that was a statement you made two years ago?

A Yes, sir.

Q Do you recall sitting down with a yellow scratch pad in May of 1973, a month ago, and drafting an affidavit?

MR. BAYDA: There's no need to ask questions about this. I prepared the affidavit for his signature.

MR. DUFF: I'm gratified for that piece of advice.

Q Now, before you signed this affidavit, Plaintiffs' Exhibit 3 for identification, you read it?

A Yes, sir.

Q And, to the best of your knowledge and belief, its contents were true, is that correct?

A Yes, sir.

Q And you knew whereof you spoke it, is that correct?

A Yes, sir.

Q Paragraph 4 of this affidavit, you state, and I quote:

"During the time which I have been an over-the-counter trader, it has always been the strictly followed procedure in the case of any stock in which the firm by whom I was employed made a market, to inquire of the seller of a block of the stock in excess of 1 or 2,000 shares whether the shares offered were part of a distribution registered with the Securities and Exchange Commission."

Now, is that a true statement?

A Yes, sir.

Q This has always been the policy?

A Yes, sir.

Q For any block of stock over 1,000 or 2,000 shares?

A Yes, sir.

Q And this was the policy not merely at Faulkner, Dawkins, it was also the policy at Singer & Mackie?

A Yes, sir.

Q And before that, it was the policy at Gregory & Sons?

A Gregory was a long time ago, and they didn't have so much stringent rules and there wasn't so much secondary stock then. At Singer, it was the rule.

Q What were your instructions at Singer about the inquiries you were to make?

A To ask basically the same questions, is it good, clean stock? It is part of a secondary?

Q All right, was that two questions or one? Did you draw a distinction between good, clean stock and part of a secondary?

A I think it basically, between traders, the word clean stock means, takes in the whole broad perspective.

Q Now, that is a language of traders, is that correct?

A Traders and anyone that's been down on the street for years.

Q Now, in this affidavit, you state that you had at least three conversations with Santangelo. I think your testimony earlier today was that you know of one conversation and maybe a second.

A Well, as I said, sir, it was two years ago, and most of that was taken around that time. I would have to say then, that is correct.

Q This was taken one month ago.

A But most of that testimony is from the original that I wrote down two years ago.

Q You have no recollection yourself of those facts, apart from what you wrote two years ago, is that correct?

A Do I have any recollection of it apart from what I wrote? Of course I do.

MR. BAYDA: Of what facts?

Q What you are saying to me is that you don't recall how many times you spoke to Santangelo, but you did prepare a memorandum two years ago which was then polished up by counsel, may I assume that was Mr. Green?

A Yes, sir.

Q And that because it was in that document, you

believe that was correct and whatever you said today may not be as correct, is that fair?

A To me, my new thinking, two or three phone conversations, I could be incorrect. On certain details that are more important, I know I am not incorrect.

Q Now, on what details that you know are more important that you know you are not incorrect?

A In the details that I asked him about this stock, et cetera, things like that.

Q Can we avoid the et cetera and things like that. You asked him about the stock. What specifically did you ask him on each of these conversations?

A On the original one I asked him if it was clean stock, which I testified I think before.

Q And he had told you that it was?

A It was. And he said that it was not part of any secondary distribution.

Q Any? He used the word any?

A Yes, sir, to the best of my recollection.

Q Why would you recollect any, if you can't remember how many times you spoke to him in 1971? You only knew--

MR. BAYDA: I object.

MR. DUFF: I'm sorry, this is a witness for the other party. It is the functional equivalent of

cross-examination. Your man is building a case for fraud by the use of a word, any, which you know and I know was never uttered because these people knew of--

MR. BAYDA: I never knew of that at all, sir. And you are asking him about his mental processes.

MR. DUFF: I'm asking him whether he knew it was the word any, when he can't remember how many times he talked--

MR. BAYDA: And he testified that he did know it was the word any.

MR. DUFF: Then I'm entitled to examine.

Q Why do you remember the word any?

MR. BAYDA: I object.

MR. DUFF: You object?

MR. BAYDA: I object. You are not entitled to ask a question as to his mental processes, why he may have remembered one thing and not another. This was two years ago.

MR. DUFF: Mr. Bayda, then would you kindly hand me the memorandum he wrote two years ago--

MR. BAYDA: We have been through this. If you want to go for a ruling on it, I think you are entitled to it.

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MR. DUFF: I think we should call Judge Gurfein right now. If you excuse me, we shall do that.

MR. BAYDA: Well, I'll object to going for a ruling on this without papers. I think this is a question which should be briefed. I've already made my objection to you and the legal basis for it.

MR. DUFF: You tell Judge Gurfein that. We will get a conference call, if he is available, and you can tell him that.

MR. BAYDA: Fine.

(Whereupon, a recess was taken.)

(Examination adjourned at 3: 25 p.m.)

_____

Subscribed and sworn to before me

this____day of_____1973.

MR. PARKER: I think you ought to go back to the prior testimony, too, if you say that has a relationship to prior testimony.

MR. DUFF: The witness has testified, sir, in your absence, and the transcript clearly reflects it, that he had several conversations, the number he was not exactly clear on, with the plaintiff, that he asked the plaintiff certain questions, and that the plaintiff told him his stock was not involved in any distribution.

Now I attempted at that time to inquire as to the use of the word "any". That was the point at which this deposition broke off.

MR. PARKER: If you have a question, why don't you put your question?

MR. DUFF: I have put a question.

MR. PARKER: Without trying to summarize the testimony.

MR. DUFF: All right, sir.

Q Is it your testimony that in describing the status of his stock Mr. Santangelo told you that it was not part of any distribution?

A The word "any" also could have been the word "the", (spelling) t-h-e.

Q All right, sir, have you previously testified, or is it your testimony now, that at the time of your conversations with Mr. Santangelo, you knew of only one distribution of White Sheild; is that correct?

A Yes, sir.

Q And that was the distribution which we have referred to before as the Leason Distribution?

MR. PARKER: Just a moment, you are not properly reflecting what this record says.

MR. DUFF: Perhaps you could show me where I am not reflecting it properly.

MR. PARKER: I don't think there's any need for me to do that, sir.

MR. DUFF: I don't think it is a question of need.

Q What distribution were you aware of during the week prior to and including June 7, 1971?

A I had heard there was a distribution, to my knowledge, which was by the company, White Sheild Corporation.

Q Did you know who the underwriter was, if there was an underwriter?

A No, sir.

Q What was the precise question you asked Mr.

Santangelo with reference to whether or not this was clean stock?

MR. PARKER: Are you asking for the precise words, or are you asking for the substance?

MR. DUFF: I am asking for the precise words. We have had the substance.

A I asked if it was clean stock and part of any, or the secondary--I couldn't be 100 percent sure which word I used--and he said, no, it was not part of the secondary.

Q I did hear the preposition, "the".

A He said, no, it was not part of the secondary.

MR. DUFF: All right, sir. Excuse me, Mr. Bayda, did you have the original of the document which you furnished me on June 5th or 6th?

MR. BAYDA: Here it is.

MR. DUFF: Thank you, sir.

Q I show you a document, Mr. Lattuga, which has been furnished me by your counsel, and ask you if that document was prepared wholly or in part by yourself?

A It was prepared by myself and Jim McMillan.

Q Whose handwriting is it in?

A Mine, except for the White Sheild on the top.

Q All right, do you have any independent re col-

lection, sir, of when you prepared this document?

A To my best knowledge, two weeks to a month after settlement date of the White Sheild.

Q And the settlement date was?

A Or, rather, to the delivery of the stock.

Q Would that be two weeks to a month after June 15, 1971?

A Yes, sir.

Q Approximately?

A Yes, sir.

MR. DUFF: I ask that you mark this as Plaintiffs' Exhibit 4, for identification.

(Document containing handwritten notations, was marked Plaintiffs' Exhibit 4 for identification, as of this date.)

Q Now, sir, referring to Plaintiffs' Exhibit 4, for identification, I note that it has some abbreviations in it. I wonder if you could, for the record, read off the text, filling in the abbreviations, so that the record will show just what it was that you intended to write.

A Do you want me also to give the initials, and then what they stand for?

Q I think that is the problem. We know who

the initials stand for but the record will not show that.

A "JV"--would be J. Van Neck--"received call from the floor from Frank Sant."--should be Santangelo--"in reference to 144,000 shares of White Sheild. J"--meaning J. Van Neck--"in turn gave call to J. Ec"--should be Jim McMillan. "He told J. Mc"--Jim McMillan--"that he had the stock for sale but had to wait for SEC clearance."

Q Then there is a cross out.

A Yes.

Q O.K.

A "Next day he talked to JM"--Jim McMillan--"and RL"--Ron Lattuga--

Q Does he refer to Mr. Santangelo?

A Yes, sir.

Q O.K.

A --"said he had not received the clearance yet but 100,000 shares were spoken for and he would need bid for only 44,000 shares."

Q And there is a cross out following that?

A Yes. "RL"--Ron Lattuga--"asked if it was clean stock and had anything to do with the secondary. He said 'no.'"

Q Then there is a cross out?

A Yes, sir.

Q O.K.

A "Following day we made bid on stock but he still had not received clearance. Following day we talked to --there's a cross out--"and FS"--which is Frank Santangelo--"made bid for stock, bought it through Tobey & Kirk. After hearing rumors that there was a piece of unregistered stock around, I asked head order clerk"--there's a cross out--"at TK"--which is Tobey & Kirk--"about stock. He said it was an uncoordinated--

Q The document says "and". I assume we agree that that is (spelling) a-n?

A It says (spelling) a-n-d.

Q Yes.

A "And uncoordinated." I would think it should have been an (spelling) a-n.

Q All right, sir, he said it was?

A "An uncoordinated wraparound secondary. I asked him what that was. He said he didn't know. I then told Frank Powers not to accept stock."

Q Now, this statement accurately reflect, does it, the discussions you had with the various people named in here?

A Yes, sir.

Q Did you at any time inquire of the plaintiff Santangelo what he meant by the SEC clearance, which he told you he was awaiting?

A I did not inquire of him directly.

Q What did you understand that that involved?

A My understanding was that since there was a secondary in the works, and he worked on the floor of the American Stock Exchange, he was being extra cautious to make sure he could sell a large block of stock, being a specialist with a secondary coming out.

Q Well, sir, White Sheild is not a stock listed on the American Stock Exchange, is it?

A No, sir.

Q And it was not in June of 1971?

A No, sir.

Q Is it your testimony that a member of the American Stock Exchange stands in some different position than any other seller of stock, which is not on the American Stock Exchange?

MR. PARKER: Excuse me, I object to the form of the question.

MR. DUFF: May I have the last answer read back?

(Answer read.)

"Q" --this is a question put by Mr. Duff, who is now inquiring of Mr. Lattuga, and it reads:

"Q Now, instead of saying, 'I discussed with him clean stock,' can you reconstruct for us what you said to him and what he said to you? I realize this is two years ago.

"A To the best of my recollection I asked him if this was clean stock.

"Q 'Is this clean stock?'

"A And he said, 'Yes, it was, it was not part of the secondary.'"

You can go on if you want to, but I think that is enough for the record.

MR. MARSHALL: The question now is whether he asked whether this was part of a, the, or any secondary.

MR. PARKER: I read the record and I stand on my objection. I think your question, as you put it, is not well taken and I think I responded to the inquiry you made as to what the record shows.

MR. DUFF: Where you stopped reading was at line 22 of page 18. Line 23 continues with:

"Q Well, now, who first mentioned the secondary?

"A I did.

"Q O.K. Then what was your question to him?

"A I just said it.

"Q No, you gave us a question and then you gave us an answer."

MR. PARKER: Gave an answer.

MR. DUFF: I beg your pardon "gave an answer, which, for the first time, raised the secondary. I'm trying to--

"A I said to him, 'Is this clean stock?'

"Q And he said?

"A 'No.'

"Q He said, 'It is not clean stock.'

"A It is not part of any secondary distribution.

"Q So you never mentioned the words secondary distribution, it came up in his answer to you; is that right?

"A To the best of my recollection, I thanked him for telling me that."

Q Now, having read Plaintiffs' Exhibit 4, for identification, does that Exhibit in any way refresh your recollection as to whether or not you asked plaintiff Santangelo whether his stock was part of a distribution,

or any distribution?

A This refreshes my memory, since was written right afterwards, where I asked him if it was clean stock and had anything to do with the secondary, and he said, "no". He might have expanded more. I don't remember.

Q You did ask him whether it had anything to do with the secondary?

A The, I cannot be sure of that actual word, the, any, or--

Q What I have been trying to get, sir, is whether, prior to that question, there had been any discussion of secondaries between you, because you referred to the secondary.

MR. PARKER: Prior to what question?

MR. DUFF: Prior to the question the witness has just told us he asked the plaintiff.

MR. PARKER: This is very unclear to me. I think this is very confusing and I think you had better start over again.

I think perhaps the reporter can read back the witness' last answer.

(Record read.)

Q Prior to the question to Mr. Santangelo, to

which you have just testified having had your memory refreshed, had you and he discussed any distributions of White Sheild stock?

A In that phone conversation?

Q That phone conversations with Mr. Santangelo?

A No.

Q In Plaintiffs' Exhibit 4 for identification, you state that sometime after the sale by plaintiffs to Faulkner of 44,000 shares of White Sheild stock you heard rumors that there was a piece of unregistered stock around; is that correct?

A The word unregistered to me at the time would take on a broad sense of--I would think I should have corrected it there. It was really right after. I never really noticed it. It could have been secondary distribution, shelf stock, etc., or secondary distribution. I think the word unregistered is incorrect.

Q Would it help you, sir, if I told you that Mr. McMillan, on several occasions in his testimony, referred to unregistered stock and rumors of unregistered stock?

MR. PARKER: Help him in what regard?

MR. DUFF: Recall whether he word he actually used two to a month after the events was

correct, and that the present explanation is not correct.

MR. PARKER: Well, this is so confusing I have to object to the form of the question and I would ask the witness not to answer it unless you can clarify your question.

MR. DUFF: I might point out for the record, Mr. Parker, that this is your first time at this deposition, or at any deposition in this action.

We have taken the deposition of your client's former employee, Mr. McMillan, who on several occasions testified to hearing rumors that there was unregistered stock around, who was expressly asked by Mr. Bayda on cross examination as to whether or not he might have erred in his use of unregistered stock, that question being put at a time that we were being denied access to Plaintiffs' Exhibit 4, for identification, and it was Mr. McMillan's clear testimony that the rumors related to unregistered stock.

MR. BAYDA: That is not my recollection.

MR. PARKER: Just a moment, Mr. Bayda, please.

MR. DUFF: I am making the record.

MR. PARKER: You are certainly trying to.

MR. DUFF: I certainly am.

MR. PARKER: Are you through, sir?

MR. DUFF: No, sir, I am not.

MR. PARKER: Please go on.

MR. DUFF: And that we suspended Mr. Lattuga's deposition, or the deposition of Faulkner by Lattuga, precisely to obtain this document, Plaintiffs' Exhibit 4, and Plaintiffs' Exhibit 4 concerns the use of the word unregistered, and we now have an explanation which directly contradicts a contemporaneous, or virtually contemporaneous document.

MR. PARKER: Sir, you summation has been noted with great respect.

I suggest to you that, and again with great respect, that that does not grant you leave to summarize the testimony of Mr. McMillan, to use the characterizations that you have, or to try at this time to try to draw the conclusions that you have.

If you have some questions to put to this witness, sir, which are correct as to form, please do so.

MR. DUFF: All right, I would

(Record read.)

Q All right, sir, it is your testimony that when you used the word unregistered, you might have intended secondary?

MR. PARKER: I object to your characterization of the witness' testimony sir.

If you have a question, please put it to him without summarizing his testimony.

Q All right, sir, is it your understanding that stock sold in a secondary distribution is unregistered stock?

A Registered secondary would not be unregistered stock.

Q I beg your pardon?

A A registered secondary would not be unregistered stock.

Q Is it your understanding that shelf stock is unregistered stock?

A That I don't know, sir.

Q What is your understanding of the term shelf stock?

A A sort of secondary that can be sold from time to time. I am not too clear on the definition of shelf stock.

Q But you are clear that it is a secondary?

A Yes.

MR. DUFF: Excuse me a minute, off the record.

(Discussion off the record.)

MR. DUFF: May I have the last question and answer read?

(Record record.)

Q So that you did not use the word unregistered to mean either shelf or secondary; is that correct, sir?

MR. PARKER: No, he didn't so testify. His testimony is there, sir.

MR. DUFF: Well, I am not at all clear, Mr. Parker, because it seems to me he has explained that he used the word incorrectly; that he thought it meant one of two other things.

Q It is true, is it not, sir, that at no time prior to this transaction with Mr. Santangelo did you attempt to obtain a copy of a red herring relating to any registration of White Sheild stock?

MR. PARKER: It has already been asked

and answered, Mr. Duff.

Q Now, after you heard fumors that there was a piece of unregistered stock around, whatever you intended by that phrase, you telephoned the head order clerk at Tobey & Kirk; is that correct?

A Yes, sir.

Q Do you recall his name?

A Vin Ross, which is not in here. I thought it was.

Q Vin Ross is the head order clerk?

A As far as I knew he was.

Q But you spoke to Mr. Ross regardless?

A Yes, sir.

Q What did you ask him, sir?

A I had told him that I had heard Tobey & Kirk was selling the stock all over the street and I wanted to know about the stock I had bought, was it part of a secondary.

Vin Ross said, "no", it was an uncoordinated wrap-around secondary.

I asked Vin what that meant, and he said he didn't know.

I said when you deliver the stock will you send-- does that come with a prospectus?

He said; "No, but if you want one I'll send it."

Q From whom had you heard that Tobey & Kirk was selling the stock all over the street?

A From other traders in the stock.

Q Can you name any of them?

A Sherwood Securities, Singer & Mackie, Mitchum Jones. I don't remember the other names.

Q From whom at Sherwood did you hear this?

A I don't recall the names of the traders, sir.

Q Of any of them?

A No.

Q How about Singer & Mackie?

A To the best of my knowledge, it would have to be the trader in White Sheild.

Q You don't know his name?

A Jim Mullen.

Q Do you have any recollection of what Mr. Mullen may have said to you on the subject?

A No, sir.

Q Do I understand correctly that in this conversation with Mr. Ross he said to you that he would not normally delivery a prospectus with this stock but you could have one if you wanted it?

MR. PARKER: Please, Mr. Duff, I wish you would refrain from, and I ask this really with

great humility, from trying to summarize this witness' testimony.

He has given his testimony. It is on the record. You are changing it in some respects. I am not going to comment now upon the degree to which you are changing it, but if have a fresh question to ask, I would respectfully ask you to do so.

MR. DUFF: May I have the portion of the answer dealing with the discussion between the witness and Mr. Ross read?

(Record read.)

Q When Mr. Ross told you that if you wanted a prospectus he would send one, did you accept that offer?

A I said, "No, we don't want one."

Q You said you do not want one?

A Yes, sir.

Q Now, on or about June 7, 1971, the defendant, Faulkner, Dawkins, sold 20,000 shares of White Sheild stock to Singer & Mackie and to Mitchum Jones and Templeton; is that correct, sir?

A Yes, sir.

Q Did you handle that sale?

A Yes, sir.

MR. PARKER: I don't recall the testimony that way, but if you say so--

MR. DUFF: Let us go back and get it then.

(Record read.)

Q Did you have occasion to call the traders at Singer, Mackie or Mitchum Jones for the purpose of cancelling the sales of White Sheild stock, which you had sold them on or about June 7, 1971?

A Yes.

Q You placed the call in each case?

A Yes, sir.

Q Do you recall approximately when you placed that call?

A Shortly after the settlement date.

Q Which I think we are agreed is June 15, 1971?

A Yes, sir.

MR. PARKER: Well, whatever the record shows the record shows.

MR. DUFF: I just want the record to be complete here. There is no dispute as to the date.

MR. PARKER: Well, there is.

MR. DUFF: I was not aware of it.

Q And did you speak to Mr. Mullen and Mr. Griffith on that occasion?

A Yes, sir.

Q What did you say to Mr. Mullen?

A On the advise of our house attorney we had bought stock that was not clean and we were refusing to accept that stock, so we would have to cancell those sales.

Q And by "house attorney", are you referring to Mr. Marc Green?

A Yes, sir.

Q Did Mr. Mullen say anything in response to that?

A I don't really recall. I know he talked to a partner at Singer, Mackie before he came back and said, "Well, all right, we will cancell that end of the transaction."

I think with Mitchum Jones it was cancelled right then on the phone.

Q And then you spoke to Mr. Griffith?

A Yes, sir.

Q And I gather the instructions to cancell these trades did come from Mr. Green, as you told Mr. Mullen?

A Yes--no, I don't know that I said that, no.

think I said, "O house attorney." I don't I used his name. I think I said, "Our house attorney advised me."

Q I understand but did you receive your instructions to cancell these trades from Mr. Green or from someone else?

A From Mr. Green.

Q Was that on approximately June 15?

A On or about that date, sir.

Q Did you have any discussions either with Mr. Mullen or with Mr. Griffith, or with anyone in Faulkner, Dawkins, about covering your sale to them by purchasing on the street?

A To Mr. Mullen or Mr. Griffith?

Q Or with anyone in Faulkner, Dawkins.

A To my best recollection I discussed this with Marc Green. He told us he wanted us to drop the stock in NASDAQ because we couldn't determine what kind of stock we would be buying.

Q During the period commencing June 7, 1971 and ending June 15, 1971, did you have any other sales of White Sheild by Faulkner to any other broker or dealer?

A I would have to get out my records. There might have been hundreds and two hundreds. I don't really

recall that, sir. I would have to get the trading records and look that up.

Q Do you have any recollection if any other trades, other than trades with Singer & Mackie and Mitchum Jones were cancelled by Faulkner, Dawkins after June 7, 1971, and I am speaking of trades of White Sheild.

A To the best of my recollection, those were the only two trades cancelled.

Q When you spoke to Mr. Ross and he told you about the stock that plaintiff had sold Faulkner through Tobey & Kirk was part of an uncoordinated wrap-around secondary--

A Yes, sir.

Q --did you make any inquiry of anyone, other than Mr. Ross, as to what those terms meant?

A I asked a number of people. Half of them I don't remember who I asked. I can remember asking people. I don't remember anyone ever giving me an answer, knowing what it was.

Q Do you now know what it is?

A The correct definition of it, no, sir. I can assume what I think it is but I don't know.

MR. PARKER: We don't want your assumptions. You have answered it.

Q But is it your understanding that an uncoordinated wrap-around secondary is a distribution?

MR. PARKER: No, there is no basis for that inquiry. You have laid no foundation for that question, and what his understanding is would not be probative in any way. He has given you the testimony about it.

Q Well, in Plaintiffs' Exhibit 4, for identification, you stated, you wrote, that after asking Mr. Ross what an uncoordinated wrap-around secondary distribution was, and he told you that he did not know, you then told Frank Powers not to accept the stock; is that correct?

A Yes.

Q Was that your own decision, or did you clear it with someone else first?

MR. PARKER: If you will permit me, Mr. Duff, I don't know that you have really restated the testimony correctly, which is a recurrance of the same kind of thing that is going to do violence to this record, for you keep restating what your understanding is of the testimony, without using what the actual testimony of the witness was.

I implore you to ask questions that are correct as to form and not based upon your inter-

pretation or characterization of the witness' testimony.

MR. DUFF: Well, without accepting the characterization of my question, I will quote from Mr. Lattuga's written statement of June of July 1971 and repeat the question.

Q In Plaintiffs' Exhibit 4 for identification, you stated:

"I asked head order clerk at TMK about stock. He said it was an uncoordinated wrap-around secondary. I asked him what that was. He said he didn't know. I then told F. Powers not to accept stock."

Now, sir, when you told Mr. Powers not to accept the stock, were you acting on your own authority, or had you been told to tell Mr. Powers not to accept the stock?

A On my own authority.

Q And you told Mr. Powers not to accept the stock, even though you did not then know, and do not now know, what an uncoordinated wrap-around secondary is?

A Yes, sir.

Q Prior to talking to Mr. Powers and telling him not to accept the stock, did you discuss your conversation with Mr. Ross with anyone else?

A Marc Green, a few seconds before Frank Powers, or a few seconds after.

Q Did you tell Mr. Green what Mr. Ross had told you?

A Yes, sir.

Q Did Mr. Green say anything?

A I told him what Mr. Ross had said and I did not know what an uncoordinated wrap-around secondary was, and I had given instructions not to accept the stock until we knew what we were getting.

Q How much, assuming that your conversation with Mr. Green was before you spoke with Mr. Powers, and I think you testified you can't recall whether it was before or after--

A They were seconds apart. Their offices are practically adjoining to each other, and I think they were both in the hallway and I spoke to the two of them.

MR. DUFF: I have no further questions.

MR. PARKER: Thank you.

MR. MARSHALL: I would like to cross examine.

EXAMINATION BY MR. MARSHALL:

Q When was the first time you spoke to anybody at Tobey & Kirk about the 44,000 shares you have been

testifying to earlier?

A On or about the day before--I can't think. I had one conversation with Vin Ross, which was on, or about the day before settlement date. That was the only conversation I had with him.

Q What did you say to Vin Ross?

A I told Vin I had heard rumors that Tobey was selling stock and I asked Vinnie about the stock that I had bought.

Vin said that it was an uncoordinated wrap-around secondary. I asked Vin what that meant. He said he had no idea, and I asked him, "Vin, does this come with a prospectus?"

He said, "No, but if you want one you can have it."

Q This was how long after the settlement? How many days?

A It has to be close to settlement date, which I think we have established was the 15th.

Q Did you ask Vin Ross specifically if these shares which you had purchased were part of a secondary, the secondary, or any secondary? Did you ask him that question at that time?

A No, sir. It was more like, "Vinnie, the shares

I bought, Vin, what were they?"

That's when he volunteered the uncoordinated.

Q When was teh first time you understood that Tobey & Kirk were to be the selling agent for these shares?

A After Jim McMillan made the original trade with Mr. Santangelo.

Q Well, how did you understand that Tobey & Kirk was the agent?

A Jim said that he had to call Tobey & Kirk to confirm the trade, or Tobey would call him and confirm the trade. I don't remember which.

Q Do you know how many days, or how many hours, or how long in general before a call was made one way or the other between McMillan and Tobey & Kirk, that McMillan told you that Tobey & Kirk was the seller?

MR. PARKER: I object to the form of the question on the ground that it is virtually incomprehensible.

Q Can you be more specific as to whem McMillan told you that Tobey & Kirk was the agent?

A My best knowledge would be right after he had gotten off the phone with Mr. Santangelo.

Q As I understand it, he had several phone calls with Mr. Santangelo.

16

A I think where Mr. Hicks indicated that he was an attorney, we discussed rather briefly, as I recall, the Jaffee case.

I think that he indicated that we are obligated to take the stock, and I think I indicated that I disagreed with him.

Q Did you gather that Mr. Hicks was knowledgeable in the securities law, and specifically in the area covered by Jaffee?

A Did I gather that from our conversations?

Q Yes.

A No.

Q Did you draw no conclusion, or did you gather that he was not knowledgeable?

MR. BAYDA: Objection..

MR. DUFF: I think his answer is ambiguous.

MR. BAYDA: I think the question is improper.

Q What else was said between you and Mr. Hicks in that telephone conversation?

A I don't think anything else.

Q He told you that Faulkner, Dawkins was obligated to take the stock; is that correct?

17

A I believe so, yes.

Q And you disagreed?

A Yes.

A Was that the end of the conversation?

A I believe so, yes.

Q Nothing else was discussed between you?

ccc A Well, it was a very brief conversation.

Q Did he indicate to you that he proposed to discuss the matter with any of his partners?

A I don't recall.

Q Did he suggest to you that perhaps one of his partners might call you?

A I don't recall.

Q Did another lawyer representing Tobey & Kirk call you?

A Yes, sir. Yes, I think he did indicate that he would have another attorney speak with me.

Q Was that attorney Peter Landau?

A Yes, sir.

Q Do you now recall his mentioning that Peter Landau would call you?

A No, sir. I remember Peter Landau called me, but I don't know whether Mr. Hicks indicated that Mr. Landau would call.

xxx

Q So Mr. Landau did telephone you?

A Yes, sir. I think essentially the same thing that Mr. Hicks said, that we were obligated to take the securities, and I indicated that I didn't believe we were obligated to take the securities.

You are asking what he said to me? I think that was all he said to me.

Q Nothing else was discussed?

A That he asked me, or that we discussed?

Q That you and he discussed.

A Yes.

I mentioned to him that I thought they were in error, and that they would be aiding and abetting a violation, and that I would be willing to rely upon an SEC decision, and that I would be willing to go with him to the regional office today, or go to Washington.

Q Did Mr. Landau tell you that he was going to instruct Tobey & Kirk to redeliver the stock?

A I recall that, but I don't recall that Mr. Landau told me that, or someone else telling me that; but I remember someone ~~else~~ telling me that Tobey & Kirk were going to deliver the stock.

Q Referring to Faulkner's answers to interrogatory No. 18?

A Yes, sir. I see it now.

I guess it was Mr. Landau, then.

Q When he said he was going to instruct Tobey to redeliver, what did you say to him? I would like your exact words, if you can recall them.

A We would reject the delivery.

Q Did you tell him that the transaction was unlawful?

A Did I use those words?

I don't recall.

Q Illegal?

A Improper.

Q The interrogatory states, the answer to interrogatory states that you advised Mr. Landau to consult the Securities and Exchange Commission before making a serious mistake?

A Yes, sir.

Q Did you advise him to consult the Securities and Exchange Commission, or did you tell him that you would go to the Securities and Exchange Commission?

A No.

I think I said that he should, but that I would participate with him.

Q What was his response to that suggestion?

A He would not do it.

Q He would not go to the Securities and Exchange Commission?

A Correct.

Q Was anything else discussed between you on the occasion of that conversation with Mr. Landau?

A I don't believe so; no, sir.

Q Did he state to you or imply to you that he would study the Jaffee matter? Had you mentioned the matter to him?

A I don't recall; but I may have mentioned Jaffee, because it encompassed everything that was transpiring here, and it was easy to say with one word. I may have.

Q Did he say that he would review Jaffee and get back to you, or anything of that sort?

A I don't recall, sir. But there were no subsequent conversations with Mr. Landau.

Q How did you leave the conversation?

A I believe it was left on the fact that we would reject the delivery, the subsequent delivery.

Q Did there come a time when you met with any representatives of Tobey or the plaintiffs?

A Yes, sir.

Q Before that, were there any subsequent conversations with any lawyers representing either Tobey & Kirk or the plaintiffs?

A Yes, sir.

Q With whom was the next conversation?

A Mr. Merritt, of Willkie, Farr & Gallagher.

Q Have you any independent recollection of when--did Mr. Merritt call you, or did you call him?

A Independent of the review?

Q Yes; independent of that.

A No, sir.

Q What was the occasion of the conversation?

A I don't understand the question.

Q How did it come about?

A He telephoned me, I guess, and said he represented Mr. Byrnes, and that we are obligated to take the stock.

Q You, Faulkner, was obligated?

A Yes. Faulkner was obligated to take the stock.

Q Just that he said. He picked up the phone, and said, "Faulkner is obligated to take the stock"?

A Yes.

I think he indicated who he was. I never heard of Mr. Byrnes. I had no idea who Mr. Byrnes was.

He said he was involved with Mr. Santangelo, and we are obligated to take the stock.

Q What did you say?

A I disagreed with him.

Q Was there any discussion of Jaffee or any other legal principles?

A I don't recall.

There was a statement, as Ihave it in my interrogatory, that he indicated he would arbitrate the matter with me.

Q You said you would prefer litigation?

A I said I prefer litigation.

Q Was anything else said in the course of that conversation?

A Not that I recall, sir.

Q Do you recall how long the conversation took?

A I think all the conversations were very brief.

Q When did you first learn of the trade with Tobey & Kirk?

A I don't recall.

Q Was it before or after the delivery of the securities?

A The reason I don't recall is because I reviewed trading sheets, and I would have seen a trade.

I am presuming I would have seen a trade of 44,000 shares being bought by our firm.

I would not have known at that time who sold the securities to us.

I know in my mind that the first time that I am really aware of it is the 15th, settlement date.

Q When you reviewed the trading sheets, the trading sheets would have shown that transaction, would they not, prior to the delivery of the securities?

A That's why I answered your question the way I have.

Q Had you had any discussion with Mr. Lattuga concerning his having heard a rumor that there was a large piece, I think the word he used, of unregistered stock floating around? I am speaking of stock of White Shield Corporation.

A I don't know what term he used.

If your question is do I recall speaking with Lattuga prior to the 15th, the answer is no, specifically about this. Mr. Lattuga and I speak frequently.

Q I appreciate that.

A Specifically this, no.

Q I am not concerned with any conversations relating to any other subject.

A No, sir, I don't.

Q Did you at any time in June of 1971 reread the Jaffee decision?

A I don't recall.

Q Following your conversations with Messrs. Hicks, Landau and Merritt, did you go back and reread Jaffee?

A I don't recall.

If you want me to speculate, I can.

Q I am not interested in your speculations. I am trying to jog your memory.

A I don't recall.

Q They had also expressed disagreement with you, had they not, with your review of what obligations Jaffee had imposed?

A That didn't shock me.

Q They had disagreed with your reading of the law?

A Yes.

Q Had you no interest in reassuring yourself that you were reading the law correctly?

MR. BAYDA: Objection.

Q Did not their disagreement cause you to attempt to reassure yourself that you had properly read

the law?

MR. BAYDA: I think the witness has already answered that he has no recollection. You have asked the question several times.

MR. DUFF: We are entitled to try and refresh his recollection.

A I don't remember the question.

MR. DUFF: May we have the question?

(The question was read.)

A I really don't need any reassurance, but I don't recall.

Q I wish I had your certainty.

Did there come a time when you had a meeting with representatives of Tobey & Kirk and/or the plaintiffs?

A Yes, sir.

Q Have you any independent recollection of when that meeting occurred?

A Independent, subsequent to the 15th?

Q How did the meeting come to take place?

A I don't recall.

Q Did you suggest there be a meeting, or do you believe that the suggestion came from the plaintiffs or Tobey & Kirk?

A I really don't recall.

I only had the one conversation, I believe, prior to the meeting with Mr. Ross. And I don't think it was that question, that question was discussed in that telephone conversation. I really don't remember.

Q From the standpoint of timing, I believe your interrogatory answers state that the meeting occurred on June 21, 1971.

Can you accept that as the date?

A Yes, sir.

Q By virtue of its being in the answers?

A Yes, sir.

Q I take it the answers made use of contemporary documentation of some sort that would have fixed that date?

A Documents that I would have prepared at the time that I had the conversations, yes, sir.

Q So there is no doubt that the meeting took place on June 21, 1971?

A No, not in my mind.

Q Do you have any recollection whether that meeting occurred before or after your telephone conversation with Mr. Merritt?

A No, sir. I don't recall.

Q Do you recall whether it occurred in the morning or the afternoon of the 21st?

A I believe it was in the afternoon.

Q Early or late in the afternoon?

A I really don't recall. I am sorry. I really don't.

This, as you are well aware, occurred in June of 1971.

Q I am just trying to get a sequence.

A I can appreciate that.

I really don't, not at all. I'm trying in my own mind to recall whether it was after the close or before the close of the market. I just can't.

Q Have you any recollection of who was present at that meeting?

A Separate and apart from my interrogatory?

Q Separate and apart from your interrogatories.

A Yes, sir.

Mr. Santangelo, Messrs. Santangelo, Byrnes, Ross, Cirenza, and the head of our block trading, whose name escapes me at the moment.

Q Would that be Mr. Vanneck?

A Yes, sir.

Q Was anyone else present?

A Mr. MacMillen may have been there. But I don't recall.

Q Mr. MacMillen has testified he was there. Does that in any way refresh your recollection?

A No, sir.

I seem to believe that he was there.

Q Was Mr. Lattuga there?

A I have no recollection of Mr. Lattuga being there at all.

xxx Q How about the discussions, if you recall, apart from the introductions and the salutations?

A I believe it was either Mr. Ross or Santangelo that described what they understood the sequence of events, including the trade of the 15th.

Q Do you have any independent recollection at this time what their description was?

A No, sir.

Q After Mr. Santangelo or Mr. Ross described the sequence of events leading to the trade--have I phrased it correctly?

A I believe so, yes.

Q (Continuing)--what was said next?

A I don't believe that any of the Faulkner people reiterated what we believe to be the facts.

Q I am sorry. I didn't get the answer.

A I don't believe that the Faulkner people reiterated what they believed to be the facts. I think there was some disagreement as to the facts.

Q By whom was the disagreement expressed?

A It may have been Mr. MacMillen.

Q Have you any recollection of what Mr. MacMillan said?

A No, sir.

MR. BAYDA: For clarification, you mean disagreement with the facts as related by Mr. Santangelo or Mr. Ross?

THE WITNESS: Correct.

BY MR. DUFF:

Q Do you recall the nature of the disagreement, which facts related by Santangelo or Ross were disagreed with?

A No, sir.

Q Prior to this meeting of June 21, 1971, had you met with Messrs. Lattuga and MacMillen or either of them to review with them the circumstances leading to the trade?

A Yes, sir.

I am sorry. Prior to the 21st?

Q Yes.

A Yes, sir.

Q You had done that prior to the meeting of June 21st. Had you asked either Mr. MacMillen or Lattuga or both of them to prepare a memorandum for you of those circumstances?

A Yes, sir.

Q I show you you a document.

MR. DUFF: My copy does not have the reporter's stamp on it. The document is the one that you produced at the Lattuga deposition, which was marked Plaintiffs' Exhibit 4 for identification.

Unless you prefer to use the stamped copy, I would like to show the witness my copy.

MR. BAYDA: That is fine.

Q I show you a document which is a copy of a document that was marked Exhibit 4 for identification, and ask you if that was the memorandum which the two gentlemen prepared prior to the meeting of June 21, 1971.

MR. BAYDA: I do not believe that the witness testified that the memorandum was prepared prior to that meeting.

MR. DUFF: I asked him whether he asked

them to prepare a memorandum prior to the meeting, and you are quite right. I jumped a question.

Q Did you ask them to prepare a memorandum prior to the meeting?

A Yes, sir.

Q Was the memorandum prepared prior to the meeting?

A No, sir.

Q When was the memorandum prepared?

A Subsequent to the meeting.

Q How much subsequent to the meeting?

A Within 30 days.

Q What was the occasion for its preparation?

A My request that it be prepared.

Q What was the occasion for your request?

A To ascertain from our traders what transpired.

Q You had already done that prior to the 21st, had you not?

A I wanted it in writing for my file.

Memories have a way of dissipating over time.

Q Yes, they do.

When you received Plaintiffs' Exhibit 4 for identification, did you have further conversations with Messrs. Lattuga or MacMillen?

A Yes, sir.

Q Did you review with them the contents of Exhibit 4?

A Yes, sir.

Q Going back to the meeting of June 21st, I think the sequence we have covered so far was that either Ross or Santangelo related his or their version of the facts giving rise to the transaction, and then someone on behalf of Faulkner expressed some disagreement.

Is that a fair description of your testimony?

A Yes, sir.

(Continued on page 49.)

Q Did anyone at that meeting suggest or accuse Santangelo of having misrepresented the fact that the stock being sold to Faulkner was not part of a registered distribution?

MR. BAYDA: Repeat the question.

(Question read.)

A I don't think so. I don't think that was the purpose of the meeting, really, to start accusing each other.

Q What was the purpose of the meeting?

A I think to try to resolve the situation.

Q Was Faulkner prepared at that time to consider possible avenues of accepting the stock?

A Yes.

Q Of course, it was your hope to persuade the plaintiffs that you were not obliged to accept the stock, was it not?

MR. BAYDA: Objection.

MR. DUFF: Your objection being --

MR. BAYDA: You are asking for a conclusion. You are asking what the witness hoped.

MR. DUFF: No. Perhaps the word "hoped" may be objectionable but the witness testified that the purpose of the meeting was a resolution. There

are many ways to resolve it. One of which that the plaintiffs agree that they are in error and not insist on the transaction.

The other is that Faulkner accepts the idea that it can accept the stock or that there be some other resolution.

It seems to me that is fair.

BY MR. DUFF:

Q In speaking of a resolution, Mr. Green, did you give any explanation to the plaintiffs or Mr. Ross as to why they should accept the cancellation of this transaction by Faulkner, Dawkins?

A I may have briefly discussed the Jaffee situation and indicated that our firm was precluded and prohibited from accepting stock in a distribution.

Q In the course of your preceding conversations with Messrs -- telephone conversations with Messrs. Ross, Hicks and Landau and in your conversation with Mr. Merritt, which was either before or after that meeting on June 21st, had you stated to any one of those lawyers or to Mr. Ross that Faulkner would not accept the stock because there had been misrepresentations of material facts concerning its status as part of a registered distribution?

A I don't believe I had.

Q Did you at that time have any reason to believe that there had been such misrepresentations?

MR. BAYDA: Repeat the question.

(Question read.)

MR. BAYDA: At what time are you referring, sir?

MR. DUFF: At any time up to June 21st, either at the meeting of June 21st or in the conversation with Mr. Merritt, whichever was later.

A Yes, sir.

Q What was the basis for your belief that there had been such misrepresentations?

A I was informed by our traders that they were told by Santangelo and someone at Tobey & Kirk that this stock was not the subject of a distribution.

These are my words.

Q Those are your words?

A Yes.

Q Did you inquire of Lattuga and MacMillen at the time they informed you, or whichever one of them informed you of that fact, what the precise words used by Santangelo or Tobey & Kirk were?

MR. BAYDA: Objection. I think you are

inquiring into an area which is privileged.

MR. DUFF: Which privilege are you invoking?

MR. BAYDA: The attorney-client privilege.

MR. DUFF: If it is attorney-client, it would seem to me that it has been waived in the following particulars:

1, the two traders have each testified as to specific conversations which they had with Mr. Santangelo and Mr. Ross of Tobey & Kirk.

2, their memorandum of those conversations which was prepared within a month after the conversations or six weeks after the conversations has been produced.

3, Mr. Green has testified as to his belief being based upon what had been told him.

At this point we are inquiring into the specific words that they told him had been utilized which can scarcely be privileged. It is merely evidentiary.

MR. BAYDA: I disagree with your con-

clusion.

I don't know what relevance his belief has. But you are asking for specific words used in a communication between an attorney and a client.

MR. DUFF: I think I will consider whether we need a ruling on that.

BY MR. DUFF:

Q The fact is, is it not, Mr. Green, that at no time in your conversations with Ross, Landau and Hicks on June 15th, in your meeting on July 21st and in your conversation with Merritt on June 21st did you accuse Mr. Santangelo or anyone representing Tobey & Kirk of having misrepresented?

MR. BAYDA: I believe you are misstating his testimony, sir.

I believe the witness testified that he had no recollection.

Q Have you any recollection of having made any such accusation at any one of those occasions?

A No, sir, I do not.

Q Did Mr. Santangelo have any conversation with Mr. MacMillen during the course of the meeting of June 21st, 1971, exclusive of salutations and farewells?

A I believe so.

Q Do you recall the substance of that conversation?

A No, sir; only the fact that they disagreed.

Q Did Mr. Santangelo ask Mr. MacMillen for confirmation of the fact that Santangelo had told him that if you look in the prospectus you will see my name?

A I don't understand the question, sir.

Q Did Mr. Santangelo ask Mr. MacMillen for confirmation of the statement -- and I am paraphrasing -- if you look in the prospectus you will see my name; that Santangelo had at some point said that to MacMillen?

A No, sir, I don't recall that.

Q Do you recall the nature of the disagreement between MacMillen and Santangelo?

A I believe it had to do with what was said to each other and what was --

Q Said, did you say, or sent?

A Said to each other in the telephone conversation.

Q Do you recall what MacMillen said was said?

A No, sir.

Q Do your notes of the meeting of June 21st reflect what MacMillen might have said to Santangelo?

A No, sir.

Q Have you examined the notes to see if they do refresh your recollection?

A Last week but I don't recall specifically that item, sir.

Q Would you care to look at them again?

A Yes.

(Recess.)

THE WITNESS: Can I have the question, please?

(Record read.)

A The only thing I have in my notes is something about MacMillen stating that at some point in time he was informed that the stock was part of an uncoordinated wrap-around secondary and I recall that Jimmy MacMillen called Tobey & Kirk to ascertain what that was.

The trader he had spoken to had no idea what it was.

When the stock came in with the prospectus he realized what it was.

Q Your notes make clear that that was MacMillen who said that?

A No, it does not.

Q Mr. Lattuga has testified that he telephoned

Vin Ross of Tobey & Kirk and inquired as to what kind of stock it was and was told it was an uncoordinated wrap-around secondary and he asked what that was and Ross said he did not know.

A My notes don't indicate who said this to me at that or said it at that meeting.

Q Do your notes indicate or refresh your recollection as to what MacMillen might have said to Santangelo as to what the disagreement between them was?

MR. BAYDA: Objection.

You are asking the witness if his notes indicate what MacMillen might have said?

MR. DUFF: I withdraw "if the notes indicate."

BY MR. DUFF:

Q Do your notes refresh your recollection as to what MacMillen said was the nature of the disagreement between him and Santangelo?

A No, sir.

Q Did you at any point in the course of that meeting have occasion to tell MacMillen to shut up?

A It sounds reasonable, but I don't recall it.

Q You don't recall not having said it?

A I don't recall saying it or not saying it.

Q Did you have any occasion in the course of that meeting of telling MacMillen in substance that he didn't know what he was talking about?

A I don't recall.

Q Do you have any recollection whether at that meeting MacMillen said to Santagelo that he, Santangelo, was getting screwed?

A No, sir.

Q You have no recollection of that, either.

What else was discussed at that meeting apart from Santangelo or Ross relating their version of what led to the transaction and someone's indicating disagreement?

A Nothing.

Q How long did the meeting run?

A Fifteen or twenty minutes.

Q Fifteen or twenty minutes.

Nothing else was discussed?

A Not that I recall.

Q That you recall.

How did you leave matters at the end of that meeting?

MR. BAYDA: Do you mean what was said at the conclusion?

MR. DUFF: It is difficult in the light

Q Do you recall what Mr. Ross said to you?

A He asked us if we would accept redelivery of the securities.

Q What was your response?

A No, we would not.

Q Had you, by the time of this telephone conversation on June 23rd - have you testified that it was on June 23rd?

A Yes, sir.

Q That is the correct date?

A Yes, sir.

Q By the time of this conversation with Mr. Ross on June 23rd, 1971 had you again had occasion to reread the Jaffee decision of the Securities and Exchange Commission?

A I don't recall.

Q Was anything else said in that telephone conversation?

A I don't believe so. I think it ended that we would not accept delivery of the stock and that was all

Q Was there any undertaking by either of you to get in touch with the other?

A No, sir.

Q Did you in the course of that telephone

conversation with Mr. Ross discuss litigation?

A I don't believe so.

Q Did you in the course of that meeting on June 21st discuss litigation between plaintiffs and Faulkner or between Tobey & Kirk and Faulkner?

MR. BAYDA: Do you mean the witness personally?

MR. DUFF: Let us take the witness personally first.

A I don't recall.

Q Was litigation mentioned in your presence at that meeting of June 21st?

A I don't recall.

Q Litigation was discussed between you and Mr. Merritt, is that correct?

A That is correct.

Q Had there been any discussion of the litigation between you and Mr. Landau or you and Mr. Hicks?

A Not that I recall, sir.

Q So that to the best of your recollection the only discussion of litigation was on June 21, 1971 with Mr. Merritt?

MR. BAYDA: I believe you are again characterizing the witness' testimony. I believe

a number of times in the course of your meeting with traders?

A Yes.

Q It was not one specific item that you came and flagged for them as if it just had been decided the day before?

A That's correct.

Q What specifically did you instruct the traders to do in order to comply with the Jaffee obligations?

A I think it was essentially that at any time there was an offering of securities -- I am giving you my words. I don't know exactly what I told them.

Q I would like your words.

A Any time there was an offering of securities pursuant to a distribution, that they were not to take any ~~that~~ while we made a market on the stock.

Q You did not restrict that answer to a registered distribution, did you?

A Between you and I, no, I did not.

Between them, I don't recall.

I don't use terms here, between us, and ~~as~~ between Michael and our traders.

Q Michael is Mr. Bayda?

A Yes, this eminent gentleman on my right.

Q I appreciate the distinction and I would have expected it if you hadn't testified to it.

One does not talk to laymen the way one talks to lawyers. That we all understand.

Your affidavit speaks of the registered distribution?

A Correct.

Q Is it your testimony that your advice to the traders was not restricted to registered distribution?

A I believe so.

I think my advice to the traders had to do with any type of restricted security, any type of security that was coming out with a prospectus.

Q If it was coming out with a prospectus, it was by definition a registered security, is it not?

A Yes, a registered distribution.

I disagreed with the term registered security.

Q I accept the amendment.

In fact, Jaffee was not restricted to registered distribution. It applied to any distribution of stock?

A That's correct.

Q So your advice to the traders correctly stated what Jaffee purported to cover?

A Yes, sir.

Q I take it that the insertion in paragraph 5 of Exhibit 5 of the word "registered" was simply because that was what was concerned in this case and it was not intended as a limitation of what your instructions to the traders were?

A Yes, sir. I think so.

Q Did you, in instructing the traders regarding their Jaffee responsibilities, and I am assuming this is over a period of meetings, I am not restricting you to any one, advise them as to the nature of the inquiries that they should make to assure compliance with Jaffee as you were instructing them, Jaffee was --

MR. BAYDA: I believe there is an assumption in your question.

MR. DUFF: I am sorry.

MR. BAYDA: I don't believe that the witness testified that he instructed the traders to make any inquiries.

MR. DUFF: You are quite right and I withdraw the question.

BY MR. DUFF:

Q Having informed the traders that they were not to accept stock which is in distribution, registered

or otherwise, in the case of stocks in which Faulkner was making a market, did you give them any instructions as to how to avoid buying stock in distribution?

A I think I have.

It is difficult over the period of time, I am trying to departmentalize my thoughts as to what may have transpired between March and June and subsequently.

But I think I have generally over a period of time discussed, maybe not specifically, what they should ask but what the problems were. And I was not dealing with people who were new to the industry or neophytes. Most of them were well aware of their obligations generally without knowing the specific legal reasons for them.

Q Did you at any time either before or after June 7th suggest to the traders that there might be certain questions which should be asked with respect to any large block of stock that was being offered?

A Yes, sir.

Q Do you believe that those instructions might have occurred prior to June 1st?

A Yes, I do think that it occurred prior, during and after.

Q What did you specifically instruct them to

ask?

A All I can do is speculate as to what I believe I would have said.

MR. BAYDA: There is no point in speculating.

THE WITNESS: I don't specifically recall telling them, you look at A, B and C and not at D, E and F.

I just don't remember.

(Continued on page 84.)

Green

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Q Did you at any time instruct the traders to obtain copies of red herring prospectuses applicable to securities of companies in the stock of which Faulkner was making a market?

A I think I instructed them that if there was an underwriting, we were to get out of the sheets so as not to take distribution stock, or asked whether or not the stock that is being sold to us is distribution stock or stock accompanied by a prospectus.

Q Were those alternatives, or you can't recall what it was that you instructed them?

A Correct.

I think in essence it boiled down to that, but I don't recall specifically what I may have told them.

Q Does Faulkner have an underwriting department?

A Yes, sir.

Q Is its responsibility confined to underwritings in which Faulkner is either the underwriter or a participating broker-dealer, or in some way engaged in the underwriting?

A You left out "syndicate."

Q Syndicate?

A I don't know what other areas there are.

Yes.

Q Is it part of the responsibility--is there any department in Faulkner or any individual in Faulkner whose responsibility it is to keep abreast of public offerings of securities, either generally or securities in which Faulkner is making a market?

A I think the Trading Department is aware.

Q That would be the traders?

A Yes, sir.

I read, and I have read, the SEC Digest, and I am aware of underwritings.

I presume our underwriting department does the same.

I'm not sure I understand the question, though.

Q Was it your understanding in the course of your conversations with Messrs. Lattuga or MacMillen after the trade in suit, that they knew prior to the trade in suit that there was to be a distribution of stock in White Shield?

MR. BAYDA: Objection.

MR. DUFF: What is the nature of the objection, sir?

MR. BAYDA: There are two objections: No. 1, I believe you are calling for communications which are privileged; secondly, I object to a

question as to the witness' understanding.

MR. DUFF: So far as privilege goes, both MacMillen and Lattuga have testified as explicitly as it is possible for a man to testify, that at least one month before the trade in suit, they knew what was the Leason secondary, a secondary distribution of White Shield which, in fact, were underwritten by Leason & Company.

Although they did not know that it was an underwritten distribution, they did speak of it as a Leason secondary.

So that that information has already been given by the client. And any privilege that might attach to it there would seem to have been waived.

The question is whether Mr. Green knew in the first three weeks of June that the traders knew of a secondary in the stock of White Shield prior to the trade.

MR. BAYDA: I understand the question, and I object to it.

BY MR. DUFF:

Q Did you know at that time that there was a secondary in the stock of White Shield?

A Prior to this transaction?

Q Prior to this transaction.

A I don't recall.

Q You do get the SEC releases?

A Yes.

Q You do look at the trading sheets?

A Our trading sheets?

Q Your trading sheets.

A Yes, sir.

Q You knew prior to June 1, 1971 that Faulkner was making a market in the stock of White Shield Corporation?

A If that was the fact.

Q In reviewing the SEC releases, did you note that Faulkner had filed one or more registration--

MR. DUFF: Withdrawn.

Q In reviewing the SEC releases, did you note that White Shield Corporation had filed one or more registration statements with the Securities and Exchange Commission?

MR. BAYDA: At what time are you referring to?

MR. DUFF: Prior to June 1, 1971.

A I don't recall.

Q Would it be the responsibility of anyone other than yourself at Faulkner, Dawkins to ascertain whether a registration statement had been filed by an issuer in whose stock Faulkner was making a market?

A Responsibility, I don't know.

Q Duty?

A I have difficulty answering the question as to responsibility or duty.

I think there were others who may have been aware of it, as to the specific responsibilities of determining.

Q Did you at any time regard it as part of the Jaffee obligations, or did you instruct the traders that it was part of their obligations--I think you have already testified that you have--not to take stock that was in distribution in which Faulkner was making a market?

A Yes, sir.

Q Did you not understand that the best way to find out if stock is in distribution is to obtain a copy of the prospectus covering that stock?

MR. BAYDA: Objection.

MR. DUFF: As to--?

MR. BAYDA: I object to the form of the

6

question.

You are asking the witness not only a conclusion, but his understanding.

BY MR. DUFF:

Q Is it not a fact, sir, that the registration statement, any registration statement, discloses on whose behalf the stock which is registered is being sold or offered?

MR. BAYDA: Objection.

MR. DUFF: And the nature of the objection?

MR. BAYDA: I object to the relevance of it.

MR. DUFF: Relevance is saved until trial.

THE WITNESS: Can I hear the question?

MR. DUFF: Read the question.

(The question was read.)

A I don't know. I would think so, but I don't know.

Q Don't you know, sir, that one place in which you could ascertain who is participating in a distribution as a selling shareholder would be in a prospectus applicable to that distribution?

MR. BAYDA: Objection.

MR. DUFF: The witness nodded.

What was the objection?

MR. BAYDA: I think you are asking the witness for legal conclusions.

MR. DUFF: I am asking the state of his knowledge of facts.

MR. BAYDA: Then I also object to the relevance of it.

MR. DUFF: The relevance, as I say, is part of our normal stipulation.

The witness did nod affirmatively.

Q Is your answer "Yes"?

THE WITNESS: I want to know the question.

(The record was read.)

A Yes.

Q I ask you specifically, sir: Did you, at any time, instruct the traders in connection with your instructions as to compliance with Jaffee and its commands, to obtain copies of the prospectus, red herring or final, applicable to any security in which Faulkner was making a market?

A No, sir.

Q Were any of your instructions to the Faulkner traders in writing?

A Yes.

Q Were these part of a guide or rule book or similar manual prepared for their use as traders?

A Yes.

Q Is that a document which is prepared, maintained and augmented in the regular course of Faulkner's business?

A Yes.

Q Is it required to be maintained by Faulkner's regulations or rules?

A By our internal rules?

Q Yes.

A It is required to be maintained by the regulatory agencies.

MR. DUFF: I would like to ask Mr. Bayda for the production of that manual, excised, if you wish, to cover the Jaffee ramifications.

MR. BAYDA: I do not believe there has been any testimony about a manual.

MR. DUFF: The man just this moment testified.

Read the answer.

(The answer was read.)

BY MR. DUFF:

Q Sir, have you at any time either before or after the institution of this action ascertained whether Faulkner had possession within the house of a copy of any red herring prospectus applicable to the stock of White Shield prior to the delivery of the stock on June 15, 1971?

A No, sir.

Q You have not ascertained?

A I have not ascertained.

I believe there was some discussions--

MR. BAYDA: I think the question has been answered.

THE WITNESS: Okay.

Q I am unclear as to where we stand.

MR. DUFF: Is it the witness' testimony that he has made no inquiry, or that there was no prospectus?

MR. BAYDA: I believe you asked the witness whether he ascertained whether there was a prospectus, and I believe he answered it.

Q Do you know, sir, whether prior to June 15, 1971 Faulkner, and I include the entity Faulkner, Dawkins & Sullivan, had possession of any one of the

10

red herring prospectuses applicable to the stock of White Shield Corporation?

Since I am not sure as to the specific date that the change-over occurred, by "red herring," I specifically include what is now known as a preliminary prospectus.

A I have checked, and I have not found any.

Q You have not found any within house prior to June 15th?

A Correct.

Q Are you able to state that Faulkner did not have possession?

xxx

A No.

Q Prior to June 15th?

A We have 200 employees.

I am able to state that I had checked, and no one had it that I had checked with.

Q You did not check with all 200?

A No.

Q You checked with the traders?

A Correct.

Q They did not have it?

A Underwriting Department, library, operations.

Q In the course of your negotiations--

MR. DUFF: Withdrawn.

Q In the course of your telephone conversations to which you have already testified with Messrs. Ross, Hicks, Landau, Merritt and the meeting of June 21, 1971, to which you have testified, were you keeping yourself apprised of the market price in the stock of White Shield?

A No, sir.

Q Were you aware of it?

A I don't know.

Q Did it come up in your discussions with Mr. Mackie?

A Not that I recall.

Q Did it come up in your discussions with Lattuga and MacMillan after the rejection of the stock or prior to the rejection of the stock?

MR. BAYDA: Objection.

MR. DUFF: What is the nature of the objection?

MR. BAYDA: It is privileged.

MR. DUFF: If they discussed the Yankee baseball team, that is not privileged information.

MR. BAYDA: If you wish to ask him about the Yankee baseball team, I will object on

Exhibit "2" to Depositions of MacMillen, Lattuga and Green

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS J. BYRNES and FRANCIS R. SANTANGELO,

Plaintiffs,

-against-

FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC.,

Defendants.

73 Civ. 670 M.I.G.

FAULKNER, DAWKINS & SULLIVAN,

Counterclaim-Plaintiff,

-against-

THOMAS J. BYRNES, FRANCIS R. SANTANGELO and TOBEY & KIRK,

Counterclaim-Defendants.

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES C. McMILLEN, being duly sworn, deposes and says:

1. I am presently employed by Weeden & Co., a securities broker and dealer, in New York, New York, as an over-the-counter trader. My employment by Weeden & Co. commenced in December, 1971.

2. From in or about March, 1971, through in or about October, 1971, I was employed by Faulkner, Dawkins & Sullivan ("Faulkner"), one of the defendants herein, as an over-the-counter trader. During that period, Faulkner was a market-maker in the Common Stock of White Shield Corporation.

PLTFS EX. 2-id
DEFTS EX.
HARVEY KEITEL
REPORTER 6/4/73

3. During the first week of June, 1971, and prior to June 7, 1971, I spoke by telephone on several occasions to Mr. Francis R. Santangelo, one of the plaintiffs herein, in connection with a proposed offer and sale by him to Faulkner of 44,000 shares of Common Stock of White Shield Corporation.

4. In one or more of those telephone conversations, Mr. Santangelo advised me that such shares belonged to him, but that he was waiting for "SEC clearance" of some kind before he would sell the stock.

5. I had become aware, prior to June 7, 1971, that a registration statement had been filed with the Securities and Exchange Commission by White Shield Corporation under the Securities Act of 1933 to register a secondary distribution of its Common Stock.

6. Because Faulkner was a market-maker in the Common Stock of White Shield Corporation, and accordingly could not participate in a distribution thereof, I specifically asked Mr. Santangelo in one of our telephone conversations prior to June 7, 1971, whether his shares were part of the registered distribution. He answered that his shares were not part of the registered distribution.

7. On June 7, 1971, Mr. Santangelo telephoned me and told me that a Mr. Vin Ross at Tobey & Kirk would call me to make the trade. Mr. Ross did so call on that date and we agreed that Faulkner would purchase 44,000 shares of Common Stock of White Shield Corporation at $14.00 per share.

8. Accordingly, on or about June 7, 1971, Faulkner sent a written confirmation of the transaction to Tobey & Kirk, and Tobey & Kirk sent a written confirmation of the transaction to Faulkner.

Exhibit "2" to Depositions of MacMillen, Lattuga and Green

9. The confirmation from Tobey & Kirk did not state that the shares were part of a registered distribution and was not accompanied or preceded by a prospectus of White Shield Corporation.

James C. McMillen

Sworn to before me this
3rd day of May, 1973.

Notary Public

VICTOR M. MITCH
Notary Public, State of New York
No. 30-0742803
Qualified in Nassau County
Commission Expires March 30, 1975

Exhibit "3" to Depositions of MacMillen, Lattuga and Green

CAPTION OMITTED

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RONALD LATTUGA, being duly sworn, deposes and says:

1. I am an Assistant Vice President of Faulkner, Dawkins & Sullivan, Inc., the corporate successor to Faulkner, Dawkins & Sullivan, one of the defendants herein ("Faulkner"). I have been associated with Faulkner as an over-the-counter stock trader since March, 1971.

2. Prior thereto, from November, 1969, I was employed by Singer & Mackie, Inc. ("Singer"), a securities broker and dealer in New York, New York, as an over-the-counter stock trader.

3. I was the over-the-counter trader of the Common Stock of White Shield Corporation for Singer and since March of 1971 have so acted for Faulkner.

4. During the time which I have been an over-the-counter trader it has always been the strictly followed procedure in the case of any stock in which the firm by whom I was employed made a market to inquire of the seller of a block of the stock in excess of one or two thousand shares whether the shares offered were part of a distribution registered with the Securities and Exchange Commission.

5. Since at least March of 1971 Faulkner has acted as a market-maker in the Common Stock of White Shield Corporation and during the time of my association I have followed such procedure.

6. Approximately one week prior to June 7, 1971 a telephone call from Francis R. Santangelo, one of the plaintiffs herein, was referred to me as a trader in White Shield stock. I had been advised the day before by James McMillen, another over-the-counter trader with Faulkner, that Mr. Santangelo was interested in selling some shares of White Shield Corporation to Faulkner. Mr. Santangelo expressed to me a desire to sell to Faulkner some shares of Common Stock of White Shield Corporation.

7. Between that call and June 7, 1971 I had at least two additional telephone conversations with Mr. Santangelo concerning his shares of White Shield. At one point in these conversations he advised me that there were 44,000 shares available for us, but that he needed clearance from the Securities and Exchange Commission before selling the stock.

8. During the course of that telephone conversation, I specifically asked Mr. Santangelo whether the stock was part of a registered distribution. Mr. Santangelo stated that it was not.

9. On June 7, 1971, Mr. Santangelo again telephoned us and advised us that the trade would be made through Tobey & Kirk, his broker. Accordingly, on June 7, 1971, a bid was made by us by telephone on the 44,000 shares at $14 per share and accepted by Tobey & Kirk. I was never informed, either by Mr. Santangelo or by Tobey & Kirk, that any of the stock was owned by Thomas J. Byrnes.

10. A written confirmation of the trade was sent by us to Tobey & Kirk, a copy of which is annexed hereto as Exhibit A, and a written confirmation of the trade was sent by Tobey & Kirk to us, a copy of which is annexed hereto as Exhibit B. Each confirmation stated a settlement date of June 14, 1971. To my knowledge, the Tobey & Kirk confirmation to us was not accompanied by a prospectus nor did it indicate in any way that the Common Stock of White Shield Corporation sold was part of a registered distribution.

11. When the certificates for the 44,000 shares were delivered to us on June 15, 1971, we ascertained that the shares were part of a registered distribution. Accordingly, delivery was rejected and the certificates returned to Tobey & Kirk.

12. To my knowledge, the certificates were not thereafter tendered to us for acceptance.

13. Prior to the June 7 trade, we had discussed with two other brokerage firms which made a market in the stock of White Shield the possibility of a resale to them of part of the 44,000 shares. On June 7, 1971, following the trade with Tobey & Kirk, we offered an aggregate of 20,000 of the shares to the two firms, which offers were accepted. One such offer was for the sale of 15,000 shares at $14-1/8 and the second was for 5,000 shares at $14. The two purchasers were Singer and Mitchum Jones & Templeton Incorporated, each of which was making a market in White Shield stock.

14. Because of the failure of Tobey & Kirk to deliver to us shares which were not part of a registered distribution, we were unable to complete our sales to the two purchasers. Because the entire Tobey & Kirk transaction was illegal, including the portion to be placed with the two other market-makers, and because, upon information and belief, the market at that time was being permeated by White Shield stock which was part of the registered distribution, so that we could not be sure that any stock we might purchase in the open market to cover the resales would not be part of the distribution, shortly after the delivery by Tobey & Kirk on June 15, 1971, I was instructed by Marc Green, Faulkner's attorney, to cancel the said resales. Accordingly, I cancelled the said resales on that date.

Ronald Lattuga
Ronald Lattuga

Sworn to before me this
7th day of May, 1973

Dorothy E. Lipitz
Notary Public

DOROTHY E. LIPITZ
NOTARY PUBLIC, State of New York
No. 43-7564383
Qualified in Richmond County
Commission Expires March 30, 1974

Exhibit "A" to
Exhibit "3" to Depositions of
MacMillen, Lattuga and Green

C	WE BOUGHT	WE SOLD	DESCRIPTION	PRICE
			DITE SHIELD CORP .05 PV	
			1 .5 FILM SALES A MARKET IN TH	
			IS SECURITY	

SECURITY CODE	REF. NO.	PRINCIPAL	INTEREST	TOTAL

Tobey & Kirk

TOBEY & KIRK
52 WALL STREET
NEW YORK, N.Y. 10

BROKER	TRADE	SETTLEMENT
CODE	DATE	DATE

COMPARISON

EXECUTING BROKER

PLEASE STAMP AND RETURN DUPLICATE

Exhibit A.

Exhibit "B" to Deposition of MacMillen, Tattuga and Green

TOBEY & KIRK

MEMBERS NEW YORK STOCK EXCHANGE
MEMBERS AMERICAN STOCK EXCHANGE
52 WALL ST., NEW YORK 5, N. Y.

Date of Transaction 6/7/71

☐ As Principal
☒ As Agent

WE SOLD TO YOU

Date of Settlement 6/14/71

QUANTITY	DESCRIPTION OF SECURITY	PRICE	AMOUNT
44,000	White Shield Corp.	14	$616,000.00

Broker to whom Sold: Faulkner, Dawkins & Sullivan
1 New York Plaza
New York, New York 10004

IF NOT CORRECT, PLEASE ADVISE AT ONCE.

Exhibit B.

BEST COPY AVAILABLE

White - The

Exhibit "4" to Depositions of
MacMillen, Lettuga and Green

J.V. received call from floor - Frank Sant in reference to 144,000 shs of White Shield J in turn gave call to J. Mc. he told J Mc that he had the stock for sale but had to wait for SEC clearance ~~he called later~~

~~that 100,000 shs was taken~~

Next day he talked to JM + RL said he had not recvd clearance yet but 100,000 shs was taken for ~~B~~ and he would need bid for only 44,000 shs ~~of~~ PG asked if it was clean stock and had anything to do with the secondary, he said no.

~~At about this time~~

Following day we made bid on stock but he still had not received clearance. Following day we talked to F.S. made bid per stock, bought it thru Tolg + Trik. ~~Ba~~ after hearing rumor that there was a piece of unregistered stock around I asked head order clerk at T+K about it - he said it was and uncoordinated about 4th - he said secondary - I asked him what that was - he ~~was~~ did not know - & then told F [illegible]

Exhibit 4 for identification

A-450

Transcription of Exhibit "4" to
Depositions of MacMillen, Lattuga and Green

(Lattuga Deposition, pp. 41-42)

White Shield

Jay Vanneck received call from floor from Frank Santangelo in reference to 144,000 shares of White Shield. Jay in turn gave call to James MacMillen. He told James MacMillen that he had the stock for sale but had to wait for SEC clearance.

Next day he talked to James MacMillen and Ronald Lattuga, said he had not received clearance yet but 100,000 shares was spoken for and he would need bid for only 44,000 shares. Ronald Lattuga asked if it was clean stock and had anything to do with the secondary, he said no.

Following day we made bid on stock but he still had not received clearance. Following day we talked to Frank Santangelo, made bid for stock, bought it through Tobey & Kirk. After hearing rumors that there was a piece of unregistered stock around I asked head order clerk at Tobey & Kirk about stock---he said it was and [sic, 'an'] uncoordinated wrap-around secondary. I asked hom what that was---he said he didn't know. I then told Frank Powers not to accept stock.

Exhibit "5" to Depositions of MacMillen, Lattuga and Green

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS J. BYRNES and FRANCIS R. SANTANGELO,

Plaintiffs,

-against-

FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC.,

Defendants.

73 Civ. 670 M.I.G.

FAULKNER, DAWKINS & SULLIVAN,

Counterclaim-Plaintiff,

-against-

THOMAS J. BYRNES, FRANCIS R. SANTANGELO and TOBEY & KIRK,

Counterclaim-Defendants.

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARC R. GREEN, being duly sworn, deposes and says:

1. I am an attorney employed by Faulkner, Dawkins & Sullivan, Inc., the corporate successor to Faulkner, Dawkins & Sullivan, one of the defendants herein ("Faulkner"). I have been so employed by Faulkner since March of 1971.

2. Faulkner is a securities broker and dealer located in New York City. Among its operations in June of 1971, Faulkner acted as a market-maker of the Common Stock of White Shield Corporation.

3. As a market-maker for White Shield Corporation stock, Faulkner regularly purchased and sold the stock as principal and regularly made offers and sales therefor by the entry of bid and ask quotations through NASDAQ, the automated quotation system of the National Association of Securities Dealers, Inc.

4. In a proceeding before the Securities and Exchange Commission in 1970 entitled "In the Matters of Jaffee & Company, et al.", the Commission determined that the participation by a market-maker of a security in a distribution of that security which is registered under the Securities Act of 1933 constitutes a manipulative practice in violation of Rule 10b-6 promulgated under the Securities Exchange Act of 1934.

5. Following the Jaffee decision, I instructed all of Faulkner's traders to be sure that any stock purchased in connection with Faulkner's market-making operations was not included in a registered distribution of that stock.

6. The Jaffee case involved a so-called "shelf" secondary distribution, which means, in essence, an offering from time to time by the holders of outstanding securities, which offering is registered under the Securities Act of 1933, but is not underwritten. Normally, the selling stockholders offer the stock through brokers and dealers.

7. On or about June 15, 1971, Tobey & Kirk delivered certificates for 44,000 shares of Common Stock of White Shield Corporation to Faulkner, purportedly attempting to settle a sale made by Tobey & Kirk to Faulkner of 44,000 shares on June 7, 1971.

8. I ascertained that the stock delivered was included in a "shelf" registration for sale on behalf of certain selling stockholders. For the reasons hereinafter set forth, I instructed the personnel in Faulkner's delivery cage to reject the stock.

9. The two traders of Faulkner who had participated in the purchase of the stock on June 7, 1971 from Tobey & Kirk, James McMillen and Ronald Lattuga, informed me that prior to June 7, 1971 they had negotiated for the resale of 20,000 of the shares to be purchased to Singer & Mackie, Inc. ("Singer") and Mitchum Jones & Templeton Incorporated ("Mitchum"). They further informed me that on June 7, 1971, after the purchase of the 44,000 shares had been made from Tobey & Kirk, 20,000 of the shares were immediately placed, i.e. resold to Singer and Mitchum. The aggregate markup on the resale was $1,875.

10. Both Messrs. McMillen and Lattuga informed me that prior to the purchase of the 44,000 shares on June 7, 1971, they had specifically asked Francis R. Santangelo, one of the plaintiffs herein, who had stated that he owned the 44,000 shares, whether the stock was included in a registration statement, and that he had answered that it was not so included.

11. Following rejection of the 44,000 shares tendered by Tobey & Kirk on June 15, 1971, Faulkner did not have the 20,000 shares to cover the resale to Singer and Mitchum, and in fact had no White Shield stock in its inventory. This left Faulkner with two possible alternatives: First, Faulkner might attempt to acquire shares in the open market to cover the resales. Second, Faulkner might cancel the resales.

12. The first alternative seemed most attractive, because on June 15, 1971, the market price for the Common Stock of White Shield Corporation had dropped by approximately 1-1/2 points, so that Faulkner might have realized a profit on the resales of approximately $32,000.

13. However, the entire Tobey & Kirk transaction was unlawful, including the portion placed with Singer and Mitchum. Singer and Mitchum were also making a market in White Shield stock.

14. Moreover, Faulkner had received reports that Tobey & Kirk was effecting a distribution of registered White Shield stock through several other market-makers, thus depressing the market price of the stock. In addition, Faulkner had received reports that there were other large blocks of White Shield stock being distributed at that time. These reports were subsequently confirmed by Tobey & Kirk and by the June 7, 1971 Prospectus of White Shield Corporation.

15. Accordingly, had Faulkner attempted to cover the resales by purchasing stock in the open market, not only would Faulkner's profit have been the result of an illegal transaction, but Faulkner would very likely have participated in an illegal distribution, since by covering the resales with stock included in the distribution, it would have been acting as a conduit in effecting the distribution through the two market-makers to whom the resales had been made.

16. Consequently, Faulkner in fact had no alternative but to cancel the resales. I accordingly instructed Mr. Lattuga to cancel the resales and am informed that they were so cancelled.

Marc R. Green

Sworn to before me this
7th day of May, 1973.

Dorothy C. Lipitz
Notary Public

DOROTHY C. LIPITZ
NOTARY PUBLIC, State of New York
No. 43-7764363
Qualified in Richmond County
Commission Expires March 30, 1974

Plaintiffs' Notice of Motion for Reargument or for Certification under 28 U.S.C. 1292(b) or FRCP 54(b)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS J. BYRNES and FRANCIS R. SANTANGELO, Plaintiffs, -against- FAULKNER, DAWKINS & SULLIVAN and SINGER & MACKIE, INC., Defendants.	73 Civ. 670 HFW
FAULKNER, DAWKINS & SULLIVAN, Counterclaim-Plaintiff, -against- THOMAS J. BYRNES, FRANCIS R. SANTANGELO and TOBEY & KIRK, Counterclaim-Defendants.	NOTICE OF MOTION FOR REARGUMENT OR FOR CERTIFICATION UNDER 28 U.S.C. § 1292(b) OR RULE 54(b), FRCP

S I R S :

PLEASE TAKE NOTICE, that upon all of the papers and proceedings heretofore had herein, and upon the decision of Hon. HENRY F. WERKER, United States District Judge, entered the 27th day of February, 1976, the undersigned will move before Judge Werker, in Room 905 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on the 22nd day of March, 1976, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order:

1. Pursuant to Rule 9(m) of the General Rules of the United States District Court for the Southern District of New York granting plaintiffs and third-party defendants reargument:

(a) To correct the portion of the decision at pages 3-4 which ascribes to plaintiffs an agreement that the mere failure to disclose the fact that the stock being sold was in fact registered would be a material and fraudulent omission in violation of Section 17 of the 1933 Act and Section 10(b) of the 1934 Act.

(b) Insofar as the decision failed to decide so much of plaintiffs' motion for summary judgment dismissing the Third Counterclaim asserted by defendant and third-party plaintiff Faulkner, Dawkins & Sullivan for failure to show damages compensable under the Securities Exchange Act, and insofar as said Counterclaim seeks punitive damages and attorneys fees under New York law; and on reargument, granting plaintiffs summary judgment of dismissal as to all aspects of the Third Counterclaim.

2. Pursuant to 28 U.S.C. § 1292(b), certifying the importance of the controlling questions necessarily decided by the Court in granting Faulkner's motion for summary judgment and denying plaintiffs' motion for summary judgment with respect to Second Defense, and in denying plaintiffs' motion for summary judgment with respect to the First and Third Defenses, and in the case of the Second and Third Defenses, certifying the grounds of the Court's denial to plaintiffs of the right to invoke § 19(a) of the Securities Act.

3. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, directing entry of final judgment of dismissal, and cer-

tifying that there is no just reason for delay, with respect to each claim, cross-claim or counterclaim which has been dismissed, including the claim of plaintiffs against former defendant Singer & Mackie, Inc., dismissed by Judge Gurfein in 1973, and the counterclaim of plaintiffs against Faulkner for breach of contract.

4. Granting to plaintiffs such other, further and different relief as to the Court may seem just and proper in the premises.

Dated: New York, New York
March 7, 1976

Yours, etc.,

CARRO, SPANBOCK, LONDIN, RODMAN & FASS
Attorneys for Plaintiffs and Third-Party Defendants Thomas J. Byrnes and Francis R. Santangelo

By _____
A Member of the Firm
10 East 40th Street
New York, New York 10016
Tel. (212) 889-3600

Faulkner's Notice of Motion for Reargument

CAPTION OMITTED

S I R S :

PLEASE TAKE NOTICE that pursuant to Rule 9(m) of the General Rules of this Court, the undersigned will move before Hon. Henry F. Werker, United States District Judge, in the United States Court House, Foley Square, New York, New York, on the 19th day of March, 1976, for reargument of the motions for summary judgment on the Fourth and Seventh Affirmative Defenses and Second Counterclaim asserted by defendant and Counterclaim-Plaintiff Faulkner, Dawkins & Sullivan, which were determined by a Decision

Notice of Motion for Reargument of Faulkner, Dawkins & Sullivan

of this Court filed February 27, 1976, on the ground that the Court overlooked controlling matters and decisions.

Dated: New York, New York
March 8, 1976

JACOBS PERSINGER & PARKER

By: J. Michael Bayek
A Member of the Firm

Attorneys for Defendant and
Counterclaim-Plaintiff Faulkner,
Dawkins & Sullivan
Office and P.O. Address
70 Pine Street
New York, New York 10005
Tel. (212) 344-1866

TO: CARRO, SPANBOCK, LONDIN,
RODMAN & FASS
Attorneys for Plaintiffs
and Counterclaim-Defendants
Thomas J. Byrnes and
Francis R. Santangelo
10 East 40th Street
New York, New York 10016

HALL, DICKLER, LAWLER, KENT
& HOWLEY
Attorneys for Counterclaim-
Defendant Tobey & Kirk
460 Park Avenue
New York, New York 10022

SECURITIES AND EXCHANGE COMMISSION
As Amicus Curiae
Office of the General Counsel
500 North Capitol Street, N.W.
Washington, D.C. 20549

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SCOTT ALVINO, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 5701 15 AVE BROOKLYN N.Y.

That on the 16 day of AUGUST, 1976, deponent personally served the within APPENDIX

upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing~~ _____ true copies of same ~~enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

JACOBS PERSINGER & PARKER
ATTORNEYS FOR DEFENDANT-APPELLEE
AND COUNTERCLAIM PLAINTIFF APPELLEE, APPELLANT
FAULKNER DAWKINS & SULLIVAN
70 PINE ST.
NEW YORK, N.Y.

Scott Alvino

Sworn to before me this
16 day of August, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

STEPHEN SHEA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1221 EAST 59 ST BROOKLYN, N.Y.

That on the 16 day of AUGUST, 1976, deponent personally served the within APPENDIX upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 1 true copy of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

HALL DICKLER LAWLER KENT + HOWLEY
ATTORNEYS FOR COUNTERCLAIM-DEFENDANT-APPELLEE
TOBEY + KIRK
460 PARK AVE.
NEW YORK, N.Y. 10022

Stephen Shea

Sworn to before me this
16 day of August, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Murray H Berman, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 76 2nd Ave NY NY 10003.

That on the 16 day of AUGUST, 1976, deponent personally served the within APPENDIX upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 1 true copies of same with a duly authorized person at their designated office.

~~By depcsiting~~ _____ true copies of same enclosed ~~in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

BORDEN & BALL
ATTORNEYS FOR DEFENDANT-APPELLEE
SINGER + MACKIE, INC.
201 EAST 50th ST.
NEW YORK, N.Y. 10022

Murray H Berman

Sworn to before me this
16 day of August, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978

77

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th RD MASPETH, N.Y.

That on the 16 day of AUGUST, 1976, deponent personally served the within APPENDIX

upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 1 true ~~copies~~ copy of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

SECURITIES + EXCHANGE COMMISSION
AMICUS CURIAE
500 NORTH CAPITAL ST. N.W.
WASHINGTON, D.C. 20549
ATTN: LAWRENCE HORN

Robert La Grassa

Sworn to before me this
16 day of August, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977